(1) Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 2000

J. L. WILSON,

Petitioner

v.

JAMES NEAL, DIRECTOR
OF THE ARKANSAS SUPREME COURT
COMMITTEE ON PROFESSIONAL CONDUCT

Respondent

On Petition For A Writ of Certiorari
To The Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Are the constitutional rights of the petitioner (and all similarly situated citizen attorneys) to enjoy the federally guaranteed protections of due process and the equal protection of the laws being denied, when the Arkansas Supreme Court or the lower state's courts (in an attorney disciplinary proceeding) are allowed by the system adopted by the sate court to exercise unfettered and unlimited discretion in fashioning a sanction of "suspension" of the attorney's license to practice law (in a disbarment proceeding), when the period of such sanction of "suspension" exceeds the limitation of the period of years that the Arkansas Supreme Court's published Procedures for Regulation the Professional Conduct of Attorneys at Law imposes upon the power and authority the Arkansas Supreme Court's Committee on Professional Conduct to impose such sanction, when the court is disciplining such attorneys?

PARTIES TO THE PROCEEDING

The parties to the proceeding before Arkansas Supreme Court are the following:

Petitioner:

J. L. Wilson,
Lexa, Arkansas

Respondent:

James Neal, Director
Arkansas Supreme Court
Committee on Professional Conduct
Little Rock, Arkansas.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, J. L. Wilson, respectfully petitions this Court to issue a writ of certiorari to review the final judgment of the Supreme Court of the State of Arkansas (that was entered in this case on May 11, 2000) in this nearly 10 year long attorney disciplinary proceeding.

OPINIONS BELOW

The latest opinion (Appendix 1) in this attorney disciplinary proceeding was rendered by the en banc panel of the Arkansas Supreme Court on May 11, 2000 and is reported at 341 Ark. 282, 16 S.W.3d 228 (*Wilson VI*). The denial of petitioner's Petition for Rehearing (Appendix 3) is not officially reported, but was issued on June 29, 2000. The denial of petitioner's Motion to Stay or to Withdraw Mandate is not officially reported, but was issued on September 7, 2000.

The five prior decisions rendered by the Arkansas Supreme Court in this one attorney disciplinary proceeding are reported at 316 Ark. 588, 873 S.W.2d 552 (Ark. 1994) (*Wilson I*)(Appendix 4); 321 Ark. 70, 900 S.W. 2d 177 (Ark. 1995)(*Wilson II*)(Appendix 5); 327 Ark. 783, 939 S.W.2d 312 (Ark. 1997)(*Wilson III*)(Appendix 6); 329 Ark. 125, 947 S.W.2d 338 (Ark. 1997) (*Wilson IV*)(Appendix 7), and 332 Ark. 148, 964 S.W.2d 199 (Ark.1998)(*Wilson V*)(Appendix 8). [1]

JURISDICTION

The Supreme Court of Arkansas entered its judgment on May 11, 2000. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257.

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1 This attorney disciplinary proceeding was also removed to the federal courts by the petitioner, in a civil rights case, reported as *Neal v. Wilson*, 920 F.Supp. 976 (E.D. Ark. 1996), *affirmed*, 112 F.3d 351 (8th Cir. 1997).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

1. Criminal Proceedings. Petitioner was licensed to practice law by the State Supreme Court of Arkansas in 1973. In 1984, petitioner was indicted by a federal grand jury for Eastern Arkansas for alleged violations of various federal statutes associated with petitioner's farm operation, not with his law practice. Petitioner was accused of one count of conspiracy and various counts of violations of 18 U.S.C. §581 and 18 U.S.C. §641.

Petitioner was brought to trial in the Federal District Court, Eastern District of Arkansas, Eastern Division, in 1985, and he was convicted in the cause styled *United States of America v. Jimmie L. Wilson*, Docket No. LR-CR-84-100. Petitioner appealed this conviction to the United States Court of Appeals for the Eighth Circuit, and the decision in that initial appeal is found at 806 F.2d 171 (8th Cir. 1986). The Eighth Circuit Court of Appeals affirmed the conviction of petitioner. Petitioner then filed a *petition for a writ of certiorari* to this Court in 1986 and 1987.

This Court had under consideration, at the time of petitioner's original trial, the cause of *Batson v. Kentucky,* 426 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This Court later found that it was a violation of the Fourteenth Amendment to the

United States Constitution for government counsel to use peremptory challenges in a racially biased manner. Subsequently, in *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), this Court held that, indeed, *Batson* applied retroactively.

At the time the decisions were rendered by this Court in *Batson* and *Griffith*, petitioner's *petition for a writ of certiorari* was pending before this Court. Therein the petitioner also alleged the constitutional misuse of peremptory challenges in his criminal prosecution. Upon two remands to the district court and after a second appeal to the Eighth Circuit Court of Appeals, the Eighth Circuit found a *Batson* violation and vacated its previous affirmance of *United States v. Wilson,* which is found at 806 F.2d 171 (1986). See, *United States v. Wilson*, 815 F.2d 53 (8th Cir. 1987); *United States v. Wilson,* 853 F.2d 606 (8th Cir. 1988); *United States v. Wilson,* 861 F.2d 514 (8th Cir. 1988); and *United States v. Wilson*, 884 F.2d 1121 (8th Cir. 1989).

In August 1990, while awaiting retrial, a plea bargain was reached between the petitioner and the United States. Petitioner, on August 2, 1990, entered a plea of guilty to *information* charging him with five misdemeanor counts. These misdemeanor counts were modified to eliminate all elements of culpability from 18 U.S.C. §558 and 18 U.S.C. §641, except the "knowing" element. Petitioner was later sentenced to four and one-half months in federal prison beginning on February 25, 1991. No fine was levied against the petitioner and he was not ordered to make restitution..

2. Disciplinary Proceeding. While serving his sentence at the Federal Prison Farm at Texarkana, Texas, petitioner received from the respondent, through the general mail, notice of a pending disciplinary action against him by the Arkansas Supreme Court's Committee on Professional Conduct (hereinafter referred to as "Committee"). Petitioner objected to the initiation of these disciplinary proceedings on the basis of violations of his constitutional rights to due process; specifically, that he was temporarily incarcerated; that he would be out of prison in a short time and that the consummation of disciplinary proceedings under these circumstances was a denial of his right to be present, to hire

an attorney, to defend himself at the proceeding, to present witnesses, and to cross examine. After denying petitioner's petition for an extension or continuation of the disciplinary process, the State of Arkansas proceed to conduct a hearing, *in absentia,* during petitioner's incarceration. However, the Committee did not render a decision until July 22, 1991, wherein it recommended the petitioner's disbarment. Petitioner was released from federal incarceration on June 24, 1991. Petitioner would have had ample time and opportunity to present himself and to defend against the charges at a hearing before the Committee between June 24, 1991 (his date of release) and July 22, 1991 (the date of the decision of the Committee), but the Committee denied the petitioner the right to such an appearance or a hearing.

On October 9, 1991, this disciplinary action was begun by the respondent's filing of a complaint against the petitioner in the Circuit Court of Phillips County, Arkansas, pursuant to the provisions of Section 5.G of the "then existing" Arkansas Procedures Regulating Professional Conduct of Attorneys at Law (hereinafter referred to as "Procedures"). Therein, the petitioner was charged with alleged violations of the Arkansas Model Rules of Professional Conduct (hereinafter referred to as "Model Rules"), specifically, Rule 8.4(b), and the Committee sought his disbarment. Petitioner, in defense of this action for disbarment, filed an answer and a Motion to Dismiss. Over the nearly 10 year period of time, between 1991 and the present, the Committee's disciplinary proceeding against the petitioner has been reviewed, in part or in whole, by the Arkansas Supreme Court at least six times. This disciplinary proceeding has also been the subject of a Petition for Removal to the United States District Court for the Eastern District of Arkansas and an appeal of the denial of the Petition for Removal to the Eighth Circuit Court of Appeals. See, *Neal v. Wilson*, 920 F.Supp. 976 (E.D. Ark. 1996). *affirmed*, 112 F.3d 351 (8th Cir. 1997).

A. First Circuit Court Ruling. In the beginning, the two elected circuit judges serving in Phillips County, Arkansas recused and the Arkansas Supreme Court appointed a special circuit judge to conduct these disciplinary proceedings. The petitioner originally objected to the prosecution of this disciplinary action by the Committee on the basis that is was barred, because the statute of

limitations had run and other constitutionally based defenses. The petitioner's actions upon which this disbarment proceedings were based occurred in 1981 and 1982. The complaint to disbar the petitioner was filed by the respondent, in 1991; some nine to ten years later. Petitioner contended that disciplinary proceedings were an *action* under Arkansas law, and that such proceeding should have been brought within five years of 1982. In this first instance, at the trial court hearing, the petitioner prevailed, and the respondent appealed. In *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994) (*Wilson I*), the Supreme Court of Arkansas *reversed* the dismissal of all charges against the petitioner and ordered a new trial in this disciplinary proceeding, on remand. As a result of this decision by the Arkansas Supreme Court, the specially appointed circuit judge recused from further participation in these disciplinary proceedings.

B. Second Circuit Court Ruling. On remand, the then recently elected circuit judge serving in Phillips County, Arkansas, stated that he would take jurisdiction over this disciplinary proceeding. The respondent objected to such proposed action because he asserted that the Arkansas Supreme Court had appointed another special circuit judge to preside, on remand, in this matter. After the elected circuit judge held a hearing, he found the petitioner guilty of the violations of Model Rule 8.4(b) and he rendered his decision by the issuance to the petitioner of a written reprimand and a letter of warning. Finding that the "elected" circuit judge's punishment imposed upon the petitioner was not as severe as he had requested, the respondent filed a *petition for a writ of certiorari* to the Arkansas Supreme Court. The Arkansas Supreme Court promptly issued the *writ of certiorari*. In *Neal v. Wilson*, 321 Ark. 70, 900 S.W.2d 177 (Ark. 1995) (*Wilson II*), the Supreme Court of Arkansas *reversed* and voided the decision of the duly elected circuit judge of Phillips County, Arkansas, and held that this elected circuit judge's ruling was void *ab initio*. However, two justices of the Arkansas Supreme Court strongly dissented and stated that they believed that the elected circuit judge had jurisdiction to preside at the disciplinary proceeding, unless he recused. The contention of the State in this second appeal was that the Arkansas Supreme Court, in this particular case, had the right to appoint a special circuit judge to preside (in lieu of the properly

elected judge) to adjudicate this cause – which was a position by the respondent that was a first in the courts of Arkansas.

C. Federal Court Removal and Rulings. Believing that his civil rights had been violated by this second reversal by the Arkansas Supreme Court in *Wilson II*, the petitioner filed to remove this disciplinary proceeding to the United States District Court for the Eastern District of Arkansas, wherein the petitioner named, as defendants, the five members of the Arkansas Supreme Court (who formed the "majority" that had ruled against him in *Wilson II*), the respondent and the special circuit judge appointed by the Arkansas Supreme Court to hear this case. All of the federal judges for the Eastern District of Arkansas recused from participating in this removal matter, and the chief judge of the Western District of Arkansas was appointed to preside over this matter. That federal judge decided that the actions of these defendants had not violated the civil rights of the petitioner and the Eighth Circuit agreed by affirming the trial judge's decision on the petitioner's appeal. See, *Neal v. Wilson*, 920 F.Supp. 976 (E.D. Ark. 1996), *affirmed*, 112 F.3d 351 (8th Cir. 1997). This matter was then transferred back to the Arkansas state courts.

D. Third Circuit Court Ruling. On remand, the Arkansas Supreme Court appointed still a third special circuit judge to preside in this disciplinary proceeding. That special judge (who is still the presiding judge over this matter in the trial court in Arkansas) summarily entered an order disbarring the petitioner and the petitioner appealed. In *Wilson v. Neal*, 327 Ark. 883, 939 S.W.2d 312 (Ark. 1997) (*Wilson III*), the Supreme Court extended the time for filing briefs because of petitioner's legislative duties as a member of the Arkansas House of Representatives. In *Wilson IV*, cited as *Wilson v. Neal*, 329 Ark. 947 S.W.2d 338 (Ark.1997), the court denied the petitioner a *writ of mandamus* in order to settle the record. Finally, in *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (Ark. 1998) (*Wilson V*), the Supreme Court of Arkansas reversed the specially appointed circuit judge's decision to summarily disbar the petitioner. This decision to reverse and remand was made by the Arkansas Supreme Court upon its finding that the petitioner's rights to due process had been denied by the

special circuit judge's summary decision, i.e. denial of a hearing on aggravating and mitigating factors.

E. Fourth Circuit Court Ruling. Upon remand of this reversal of disbarment, petitioner was again retried by the same specially appointed circuit judge. On this third remand by the Arkansas Supreme Court, the petitioner was again found guilty of violating the cited sections of the Model Rule 8.4(b). The specially appointed circuit judge sentenced the petitioner to a five (5) year suspension from the practice of law (with two years credited, for the time the petitioner had been formally disbarred during this then eight (8) year old disciplinary proceeding), as the appropriate punishment for the petitioner's actions that were complained of by the respondent.[2] The order of this special circuit judge contained scant findings or conclusions on the aggravating and mitigating factors, as mandated by the Arkansas Supreme Court's decision in *Wilson V.* However, the special circuit judge did deny the respondent's asserted claim that the petitioner should be disbarred from the practice of law in the state courts in Arkansas, when the circuit judge found that the facts of the proceeding did not support a disbarment complaint.

The petitioner again appealed this order of suspension to the Arkansas Supreme Court. The petitioner asserted that the special circuit judge could not (as he did) render a punishment

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2 The petitioner has been "suspended" from the practice of law in the federal courts for the Eastern and Western Districts of Arkansas, since a judge of the Eastern District referred the petitioner to the Arkansas Supreme Court for possible disciplinary proceedings in 1985. Though the petitioner has been "suspended" from the practice of law in the federal courts in Arkansas for more that 15 years, and he will still be suspended from the practice of law in the federal courts in Arkansas for a "net" of another three (3) years, because the chief judge of the Eastern District of Arkansas recently refused to grant the petitioner's formal request for reinstatement to practice law in the federal courts of Arkansas, until this state court "suspension" expires, effectively "suspending" the petitioner from the practice of law in the federal courts in Arkansas for a period of 18 years.

against the petitioner by imposing a five (5) year suspension from the practice of law, when the sanction of "suspension" (that the Arkansas Supreme Court created for the Committee to impose in the Procedures governing attorney disciplinary proceedings in Arkansas) was limited to only one (1) year (and only two (2) years, now, under the terms of the Arkansas Procedures Regulating Professional Conduct of Attorneys at Law (hereinafter "Procedures II") (the latest version of which Procedures had been adopted by the Arkansas Supreme Court in 1998, seven (7) years after this disciplinary proceeding was brought against the petitioner by the respondent).

The petitioner argued in this latest appeal that, for the Arkansas Supreme Court *now* to allow the special circuit judge to impose a sanction of suspension against him, for a period of time that was in excess of the limitations upon suspension that had been set and published by the Arkansas Supreme Court in its own Section 7 of its own Procedures (Appendix 9), was a violation of his federally guaranteed rights of due process and equal protection. The petitioner asserted to the Arkansas Supreme Court that, to allow such punitive action to be taken by the circuit judge would constitute clear error, because the special circuit judge would be exercising unfettered and unlimited discretion in fashioning a sanction against the petitioner, all in violation of the petitioner's constitutional rights to due process and equal protection under the provisions of the 14th Amendment to the United States Constitution. The respondent cross appealed and asked the Arkansas Supreme Court to disbar the petitioner.

On May 11, 2000, the Arkansas Supreme Court rendered a decision in *Wilson VI* that was procedurally unique and unusual. This decision had the ultimate effect of upholding, by default, the decision of the special circuit judge to suspend petitioner's license to practice law for five (5) years. The unusual aspect of this decision was because there was no "majority opinion" rendered by the Arkansas Supreme Court in *Wilson VI*. Instead, of the seven justices of the Arkansas Supreme Court, three justices (basing their opinion on due process grounds) voted to limit the sanction of suspension against the petitioner in this disciplinary proceeding to one (1) year, as the Committee was so limited by the version of the

Arkansas Model Rules of Professional Conduct (that were in effect when this disciplinary proceeding began) in applying the sanction of "suspension" against any attorney who had been found to have violated the provisions of the Model Rules of Professional Conduct. The chief justice and a special appointed justice joined in an opinion that would have granted the respondent's cross appeal for the petitioner's disbarment.[3] The other two justices, i.e. the "swing justices," joined in an opinion that held that the special circuit judge had "unlimited" discretion to fashion a punishment for the petitioner in a disbarment action (when the punishment determined by the circuit judge was less than total disbarment) and that they did not find that the special circuit judge had abused his direction in fashioning the sanction of a five (5) year suspension of the petitioner, based upon the evidentiary record. However, these two justices agreed with the other three justices that "suspension," not "disbarment," was the proper sanction to impose upon the petitioner in this disciplinary proceeding. These two justices also refused to consider addressing the petitioner's claims that his federally based due process rights had been violated.

3. Practical Effect of Disciplinary Proceeding. Thus, after 10 years of contesting and opposing the respondent's continued efforts to disbar him from the practice of law in Arkansas, the petitioner must now endure a suspension and loss of his ability to practice law for a "net" of three additional years (in addition to the two (2) years that he has been barred from practicing law in the Arkansas courts, during the nearly 10 year period that this same disciplinary proceeding has been pending). This "unique" result has occurred in the petitioner's disciplinary proceeding simply because the three justices of the Arkansas Supreme Court, who voted to limit the petitioner's suspension to a period of one (1) year (as the state Supreme Court's published rules so limited its Committee on Professional Conduct in 1990),

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3. The petitioner respectfully asserts that these two justices' opinion was based upon erroneous facts and evidence (as was later admitted and acknowledged by the chief justice in an amending letter-order written to the Court's reporter of decisions. See, Appendix 2).

could not convince one of the two "swing justices" to join them in their due process and equal protection based opinion.[4]

Petitioner's prayer for relief is that this Court will grant his *petition for a writ of certiorari*, and, after hearing his appeal, that this Court will hold that the Arkansas Supreme Court and the circuit judge, who fashioned the five (5) year suspension sanction imposed upon the petitioner in this disciplinary proceeding, have violated the rights of due process and equal protection accorded the petitioner (and similarly situated attorney/citizens) by the 14th Amendment to the United States Constitution. The petitioner asserts to the members of this court that these state courts cannot (without acting unconstitutionally) arbitrarily, and with unfettered discretion, impose suspension sanctions against attorneys in disciplinary proceedings, when the resulting suspension sanctions imposed under this system or procedure are for longer periods of time than are the time limitations set for the suspension sanctions that the Arkansas Supreme Court has formally adopted and published as the authority and power of the Arkansas Committee on Professional Conduct to impose the sanction of suspension upon such attorneys.

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4 Although Associate Justice Brown wrote (16 S.W.3d, at 229) that the decision of the special circuit judge was affirmed in *Wilson VI*, because a majority of the justices of the Arkansas Supreme Court were unable to agree on a single ground for reversal on the core issue of the proper sanction, the petitioner respectfully submits that the justice's statement that "the opinions of this court [in this case] have no precedential value" is apparently *not* correct. Within the last few weeks, the Arkansas Supreme Court has acted to increase the length of a 14 month "retroactive" suspension sanction imposed by the presiding circuit against an attorney with a "*Whitewater*" related misdemeanor criminal conviction (oddly enough, a "sanction" imposed by the same special circuit judge who imposed the five (5) year suspension on the petitioner in this disciplinary proceeding) to a "prospective" five (5) year suspension, based primarily upon the Arkansas court's recognition of the sanction imposed by that court, by default, against the petitioner in this proceeding. See, *Neal v. Matthews*, 342 Ark. ___, ___ S.W.3d ___, 2000 WL 1683376 (Ark., November 9, 2000).

REASONS WHY CERTIORARI SHOULD BE GRANTED

1. **The federally guaranteed due process and equal protection rights of the petitioner (and all similarly situated Arkansas attorney/citizens) are being blatantly violated by the exercise of unfettered and unlimited discretion by the judges and justices of the State of Arkansas in imposing sanctions in attorney disciplinary proceedings were the disbarment of the attorney is sought, especially when these judges and justices have ruled that they can ignore the express limitations of time on imposing suspension sanctions in attorney disciplinary proceedings, as set out in the published procedures adopted by the Arkansas Supreme Court.**

A. The Exercise of Absolute Discretion Results in an Unconstitutional Outcome.

1. Unique Evidentiary Record. The evidentiary record established below in the petitioner's disciplinary proceeding in the Arkansas courts is by far the most extensive record ever compiled in any attorney disciplinary proceeding in any state court. Not only have there been six opinions rendered by the Arkansas Supreme Court (over nearly a 10 year period), there have also been a federal district court decision and a federal appellate court decision rendered during the pendency of this one disciplinary proceeding.

In addition, the evidentiary record in this matter factually establishes that there is a total lack of any established standards to be applied by the judges and justices of Arkansas' courts in imposing sanctions in such attorney disciplinary proceedings. The separate opinion in this case by the two "swing justices" of the Arkansas Supreme Court declined to rule upon the petitioner's due process and equal protection arguments (16 S.W.3d, at 235). These two justices also refused to recognize that there was a one

(1) year limitation on the power to impose the suspension sanction in the Arkansas court's Procedures by stating:

> [T]he whole panoply of sanctions is available to a circuit judge and, concomitantly, to this court. And there is no basis for concluding that because the Committee can suspend a lawyer from the practice for up to one year, circuit judges are similarly limited when meting out sanctions in a disbarment action. **Our rules are so clear on this point that there is no valid basis for invoking the canons of statutory construction, as Justice Smith has done.** To do so takes a limitation on the Committee's power and impresses it on the circuit judges in disbarment proceedings, which was never contemplated by our Procedures. In sum, the circuit judge in this case had the authority to suspend Mr. Wilson from the law practice for five years. (Emphasis Added)

Therefore, the petitioner submits that the evidentiary record that has been created in his case is the best illustration of how an attorney/citizen's federal constitutional rights to due process and equal protection can be, and are, violated, because of the exercise of unfettered and unlimited discretion by Arkansas' judges and justices in fashioning sanctions in attorney disciplinary proceedings, especially when these state court judges and justices have held that they are entitled to ignore the specific limitation on the suspension sanction that is contained in Section 7 of the Procedures, which provisions are entitled "sanctions." (See Appendix 9).

These limitations in the Procedures were established and published as guidelines for these type of disciplinary proceedings by the Arkansas Supreme Court. Since attorney disciplinary proceedings are of a quasi-criminal nature (*In the Matter of Ruffalo*, 390 U.S. 544 (1968)), all provisions of the Arkansas Supreme Court's Procedures governing such disciplinary matters must be strictly construed, with the court resolving any ambiguity

in favor of the attorney. *See, In the Matter of Thalheim*, 853 F.2d 383 (5th Cir. 1988).[5]

To insure that the petitioner receives his federally guaranteed rights to due process and equal protection, the Arkansas Supreme Court must be held by this Court to adhere to its own Procedures, since that court's inherent power to discipline attorneys who practice before it does not absolve that court from its obligation to follow its own rules in the exercise of such power. *In the Matter of Thalheim, supra, United States v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir. 1986); and *In the Matter of Abrams*, 521 F. 2d 1094, 1104-05 (3rd Cir. 1975), *cert. denied*, 423 U.S. 1038 (1975).

2. Unique Procedural Record. In this disciplinary proceeding, the petitioner initially secured the dismissal of the respondent's complaint for disbarment (by the initially appointed circuit judge), based upon a statute of limitations defense; which decision was reversed by the Arkansas Supreme Court (*Wilson I*). Petitioner was next found guilty of violating the Arkansas Model Rules of Professional Conduct, and letters of reprimand and warning were issued to the petitioner by an elected circuit judge, which action was reversed by the Arkansas Supreme Court (*Wilson II*). The petitioner was then summarily disbarred (without a hearing) by a third appointed circuit judge, and that summary action was also reversed by the Arkansas Supreme Court (*Wilson V*). Finally, this third appointed circuit judge imposed a sanction on the petitioner in the form of a five (5) year suspension from the practice of law, which punishment was upheld by the Arkansas Supreme Court (only because no agreement could be reached by a majority of four justices as to the correct sanction to apply in this case (*Wilson VI*)).

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5 This is exactly the interpretative position adopted by the opinion of the three justices of the Arkansas Supreme Court in *Wilson VI* that ruled in the petitioner's favor, though such interpretative positions were supported by state law citations.

Thus, the petitioner submits that the evidentiary and procedural records established in his disciplinary proceeding in the courts of Arkansas, and the wide variety of sanctions attempted to be imposed against him by the judges and justices of those courts in this one proceeding, clearly establishes that the petitioner has suffered a denial of his federally guaranteed rights to due process and to equal protection (all as guaranteed by the 14th Amendment of the U. S. Constitution) because of all of these various sanctions that have been determined in this attorney disciplinary proceeding by the unfettered and unlimited exercise of the discretion of the state court judges and justices presiding in this matter. The abuse of these federally guaranteed constitutional rights arise when unfettered and unlimited discretion of the presiding judge or justices is allowed to be exercised and applied as the *only* hallmark or guidepost for the imposition of sanctions in such disciplinary proceedings.

These violations of the petitioner's federally guaranteed rights to due process and equal protection have been "compounded" when these state court jurists held, *sua sponte*, that they are allowed to ignore the time limitations on such sanctions that have been created and published by the Arkansas Supreme Court, itself, in its Procedures (Appendix 9). It cannot seriously be disputed that a court, having adopted rules and procedures for attorney disciplinary matters, cannot ignore its own rules and procedures in such disciplinary proceedings, even under the "inherent powers" of that court to discipline attorneys appearing before it. *In the Matter of Thalheim*, supra. The petitioner submits that the Arkansas Supreme Court's attempt to distinguish the applicability of this time limitation on the "suspension" sanction, because such "a limitation . . . on circuit court judges in disbarment proceedings. . . was never contemplated by our Procedures." (16 S.W. 3d, at 235), is a holding that is not supported by the record and, alternatively, presents an ambiguity that must be resolved in favor of the petitioner (as the three justices of the Arkansas Supreme Court agreed in their separate opinion, below. This legal reasoning is contra to all of the previously cited federal

constitutional standards that are universally applicable in attorney disciplinary proceedings.[6]

B. Rulings By Arkansas' Courts in Similar Attorney Disciplinary Matters Have Reached Disparate Results.

The petitioner's (and all of the similarly situated attorney/citizens') rights to enjoy the protections of due process and equal protection, under the 14th Amendment of the U. S. Constitution, are continually being violated by the exercise of the

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6 The Arkansas Supreme Court (16 S.W.3d, at 223) acknowledged, as "mitigating factors" in sanctioning the petitioner, that he has been involved in public service and public interest litigation. The members of this Court should be aware that the petitioner was elected and served as a representative to the Arkansas General Assembly (after his federal criminal prosecution), and that he served as a member of the Arkansas House of Representatives until "term limited" in 1998. Further, the petitioner has been the lead counsel (until this suspension from the practice of law in this case on June 29, 2000) in a state court action brought in 1992 by himself and the other African American sole practitioner attorneys against the State of Arkansas. That "public interest" litigation has resulted in a successful challenge to the unconstitutionality of the public school funding formula created by the State of Arkansas. See, *Tucker v. Lake View School District No. 25,* 323 Ark. 693, 917 S.W.2d 530 (Ark. 1996) and *Lake View School District No. 25 v. Huckabee,* 340 Ark. 481, 10 S.W.3d 892 (Ark. 2000), which action is still ongoing at this time, in a "compliance trial" ordered by the Arkansas Supreme Court. Unlike similar "state and public school funding challenges" in Kentucky (*Rose v. Council for Better Education,* 790 S.W.2d 186 (Ky. 1989)) and Ohio (*DeRolph v. State,* 728 N.E.2d 993 (Ohio 2000)), where large groups of school districts joined together to challenge their respective state's public school funding formulas, the petitioner and his co-counsel have been the only attorneys representing the Plaintiffs (a 200 student school district against the State of Arkansas) in this class action and they have successfully carried the *Lake View School District* litigation for a period of nearly 10 years (parallel to the time that the Petitioner's disciplinary proceeding has been pending), without receiving any payment of attorneys' fees or reimbursement of litigating costs, though these attorneys right to such fees and costs has now been established by order of the Arkansas Supreme Court.

unfettered and unlimited discretion of the judges and justices of the Arkansas court system in attorney disciplinary proceedings. These constitutional violations are clearly established in the evidentiary record established below in the petitioner's disciplinary proceeding in the courts below, especially when compared to the sanctions imposed by the Arkansas judiciary in the recently reported decision of the Arkansas Supreme Court in the case of *Neal v. Matthews*, 342 Ark.____, ___ S.W.3d ___, 2000 WL 1683376 (Ark. 2000). Further, these constitutional violations are illustrated by a comparison of the Arkansas Supreme Court's disparate handling of similarly situated attorneys in the cases of *In the Matter of Meurer*, 337 Ark. 608, 990 S.W.2d 552; 338 S.W.2d 373, 993 S.W.2d 917; 338 Ark. 601, 999 S.W.2d 196 (Ark.1999), a case involving a Caucasian attorney, and *Neal v. Hollingsworth*, 338 Ark. 251, 992 S.W.2d 771(Ark.1999), a case involving an African American attorney.

The petitioner submits that the resulting sanctions and punishments administered and imposed by the Arkansas courts in these four attorney disciplinary proceedings, all through the exercise of the unlimited and unfettered discretion of the judges and justices of the courts of Arkansas, are so disparate that they are, per se, clear evidence that the system created by the Arkansas Supreme Court for the disciplining of attorneys results in violations of the federal guaranteed due process and equal protection rights of the petitioner and the other similarly situated attorney/citizens that have been the subjects of these disciplinary proceedings.

1. A Comparison of the *Wilson* and *Matthews* Proceedings. A simple comparison of the Arkansas courts' handling of the petitioner's disciplinary proceeding and the disciplinary proceeding of Charles D. Matthews establishes that the exercise of unfettered and unlimited discretion by circuit court judges in Arkansas in disbarment proceedings has resulted in constitutional violations of these attorneys' rights to enjoy the federally guaranteed protections afforded to all citizens by the due process and equal protection clauses of the 14th Amendment.

Circuit Judge John Plegge was the state court judge that initially meted out punishment and sanctions in *both* the *Wilson*

and *Matthews* cases. In the case of the petitioner (an African American attorney), where there had been the entry of a plea by the petitioner to a federal criminal misdemeanor charge (which criminal charge did not involve the petitioner's law practice), the petitioner was, initially, summarily disbarred by this circuit judge, without a hearing. When that decision was overturned by the Arkansas Supreme Court's reversal of the circuit judge's action (*Wilson V*), the petitioner was then given a sanction in the form of a five (5) year suspension from the practice of law, after a hearing, even though the circuit judge failed to memorialize what consideration he had given to the aggravating and mitigating circumstances, as so directed to do by the Arkansas Supreme Court.

In the *Matthews* disciplinary proceeding, the attorney (a Caucasian attorney who was known to Judge Plegge) had pled guilty to a similar federal criminal misdemeanor charge (which criminal charge had actually involved the attorney's legal practice). Judge Plegge, in the exercise of his unlimited discretion in attorney disciplinary matters, imposed a sanction against Mr. Matthews in the form of a 14 month suspension from the practice of law, which suspension Judge Plegge made "retroactive," so that it ran concurrently with this attorney's period of incarceration in the federal prison. Judge Plegge's decision in Mr. Matthew's case was appealed by the respondent, as the representative of the Committee, and this circuit judge's actions were only very recently reversed by the Arkansas Supreme Court. The punishment imposed upon Mr. Matthews, in the form of the 14 month suspension sanction, was increased by the Arkansas Supreme Court to a five (5) year suspension sanction, with this suspension to be served "prospectively," from the time of the entry of the Arkansas Supreme Court's decision.[7]

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7 Though, at first blush, it would appear that the Arkansas Supreme Court was trying to balance and equalize the punishments meted out for both Charles Matthews and the petitioner (and Associate Justice Corbin so noted that factor in his opinion in the *Matthews* case) it seems strange to the petitioner that the Arkansas Supreme Court would adopt such a ruling in *Matthews*, when that court announced in *Wilson VI* that "the

2. A Comparison of the *Meurer* and *Hollingsworth* Proceedings. The petitioner submits that an even more egregious example of the clear violation of all attorney/citizens' federally guaranteed rights to due process and equal protection, by the Arkansas Supreme Court in state court disciplinary proceedings, is illustrated by the dissimilar decisions rendered by the Committee and the Arkansas Supreme Court in these *Meurer* and *Hollingsworth* cases.

In *Meurer,* the attorney was not charged with a criminal offense, but a complaint was filed with the Committee by a client that the attorney had taken money from her. The Committee, after a hearing, imposed a sanction in the form of a letter of reprimand and required Mr. Meurer to make restitution to the client in the amount of $18,000 at the rate of $300 per month. The attorney immediately defaulted on this obligation, he was held in contempt by the Arkansas Supreme Court and he was found to have knowingly lied to the Court in affidavits filed in his defense. Mr. Meurer was remanded to the Committee for further sanctions and suspended from the practice of law, until the Committee acted. The Committee, in the fall of 1999, imposed two sanctions in the form of separate suspensions of Mr. Meurer's license to practice law for periods of one (1) and two (2) years, respectively. The Committee and the respondent did not vote to institute disbarment proceedings against this attorney. Mr. Meurer was allowed to voluntarily surrender his license to practice law on June 22, 2000.

In *Hollingsworth*, the attorney was not charged with a criminal offense, but a complaint was filed with the Committee by a client that the attorney had taken money from her. The Committee, after a hearing, voted to institute a disbarment

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opinions of this court [in *Wilson VI*] have no precedential value" (16 S.W.3d, at 229). Therefore, the petitioner submits to this Court that any attempt by the Arkansas Supreme Court to try to achieve parity, between its decisions in *Wilson VI* and *Matthews*, do not cure the federal constitutional violations that are basically inherent in a system that allows the circuit court judges of Arkansas to exercise their unlimited discretion, without any limitation, in determining a proper sanction to impose in any attorney disciplinary proceeding brought before these circuit judges.

proceeding against Mr. Hollingsworth, even though he had made restitution of the funds to the client. Mr. Hollingsworth, who, years before, had been appointed to serve out the unexpired term of a retiring justice of the Arkansas Supreme Court, was found guilty by the circuit judge and a sanction was imposed in the form of a six (6) month suspension from the practice of law. The respondent, who was also the prosecuting party in the *Hollingsworth* case, appealed that suspension order to the Arkansas Supreme Court. There, the Arkansas Supreme Court reversed the circuit judge and disbarred Mr. Hollingsworth.

The petitioner submits to the members of this Court that the system of attorney discipline created by the Arkansas Supreme Court, in its Model Rules and its Procedures:

> (1) where the judges and justices of the Arkansas courts are empowered to exercise their unfettered and unlimited discretion on an *ad hoc* basis in the determination of sanctions to be imposed as punishment upon the attorneys brought before the Arkansas courts;
>
> (2) where these same judges and justices have decided that they are allowed or empowered to ignore the limitations created by the Arkansas Supreme Court in its Procedures for the imposition of the suspension sanction; and
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> (3) where the sanctions that are actually rendered and the punishments actually imposed (under such system in these disciplinary proceedings) are so divergent and disparate (when the attorneys, who are the subjects of such disciplinary proceedings, are in similarly situated positions),

is a "system" that (at least in its actual implementation) has resulted in the blatant denial of the federally guaranteed rights of due process and equal protection to the petitioner and any other similarly situated attorney/citizen to enjoy these rights that are

ensured by the provisions of the 14th Amendment to the United States Constitution.

The evidentiary record compiled in the Petitioner's nearly 10 year struggle to maintain his license to practice law in Arkansas will afford this Court an excellent vehicle to use in reviewing and rendering a decision on these important questions of constitutional application. An opinion by this Court would give much needed guidance, not only to the attorneys and courts of the State of Arkansas, but to all state courts considering these important constitutional matters regarding the federally guaranteed rights to due process and equal protection in the setting of attorney disciplinary proceedings.

C. The Comity Usually Accorded by This Court to State Court Attorney Disciplinary Proceedings is Not be a Bar to The Court's Need to Review the Judgment Involved Here.

The petitioner recognizes that this Court has generally declined to sit in judgment of state court disciplinary actions, *Thread v. United States*, 354 U.S. 278, 281 (1957), but there are exceptions to the degree of comity this Court accords such state court proceedings. See, *Konigsberg v. State Bar of California*, 353 U.S. 252 (1957) and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). The petitioner asserts that the denial of his federally guaranteed rights to due process and equal protection in this disciplinary proceeding warrants, nay demands, that this Court review of the "unique" judgment of the Arkansas Supreme Court in *Wilson VI*.

The petitioner submits that startling aberrations in Arkansas substantive and procedural body of law have occurred as a result of the petitioner's defense against the disciplinary charges lodged against him by the respondent and the Committee in this cause. The most dramatic result of the petitioner's broad ranging defense in this cause has been the "comprehensive" 1998 changes that the Arkansas Supreme Court made in the Arkansas Procedures Regulating Professional Conduct of Attorneys At Law (hereinafter referred to as "Procedures II") which changes were adopted on January 8, 1998. Under previous provisions of Section 7.A.(3) of

the 1990 Procedures (which provisions were, and are, applicable to the prosecution of the petitioner by the Committee), the sanction of the suspension of an attorney's license to practice law was clearly limited to one (1) year. However, under provisions of Section 7.E.(2) of the "new" 1998 Procedures II, the suspension of a lawyer's privilege to practice law can be fixed for a period of time not in excess of two years. Evidence of the petitioner's impact on these changes to the Arkansas Procedures by the Arkansas Supreme Court can be verified by simply noting the comments and case citations that appear in the annotations under each section of these newly promulgated Procedures II.

In addition to these dynamic changes in the Arkansas Procedures applicable in attorney disciplinary proceedings, this 10 year prosecution by the respondent against the petitioner has spawned a series of judicial decisions that are most novel. For example: there was a determination by the Arkansas Supreme Court that no statute of limitations applied to attorney disciplinary proceedings (*Wilson I*). That court also held that duly elected judges within the jurisdiction where the complaint was filed (if African American) do not assume the same judicial authority to hear cases and causes authorized by Article 7 of the Arkansas Constitution and, further, that the Arkansas Supreme Court, under the authority of Amendment 24 of the state constitution, has the right to displace duly elected judges from sitting as magistrates and to appoint a special judge, even where has been no recusal of the duly elected circuit judge (*Wilson II*). The Arkansas Supreme Court held that the ruling of a *de facto* judge did not activate the doctrines of res judicata, collateral estoppel, or double jeopardy in any subsequent prosecution of the same party (*Wilson II*). This court has also held that the Arkansas courts have the independent and sovereign authority to ignore this Court's finding in *In the Matter of Ruffalo*, 390 U.S. 554, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (*Wilson V*).

The Arkansas Supreme Court and its inferior courts have held that they can ignore and disregard the applicability of the rules of strict construction that must be applied to the *quasi-criminal* proceeding involving attorney disciplinary actions (*Wilson IV* and *Wilson V*). Although the applicable provisions of the Arkansas

Model Rules mandate that all persons cited for alleged violations of Rule 8.4(b) be referred to the circuit courts for disbarment proceedings, this mandated referral is now the subject of "discretionary action" by the Arkansas courts, even though in the instant cause it was declared that there was no discretion as to whether or not to refer the petitioner for disbarment.

The State of Arkansas has further determined that all persons charged with Model Rule 8.4(b) violations do not face the same requirement of being charged nor, if they are charged, do they face the same possibility of sanction, even if found guilty. Those attorneys who are charged and who are sanctioned are not limited by the same degree of sanctions available under Section 7 of the Procedures, but, instead, such attorneys are subject to unlimited discretionary punishment by the courts of Arkansas. The procedural rules, as designated in Section 5 of the Procedures, have now been determined, *expo post facto,* to be "sanction" rules enabling the resulting harsh punishment imposed against the petitioner in this case. Finally, the petitioner submits that, if the federally guaranteed rights of the petitioner to enjoy the equal protection of the laws and to secure due process interfere with the aims of punishment by those in control of the Arkansas attorney disciplinary system, then such requirements apparently can be completely disregarded by the state courts in the unfettered and unlimited exercise of these state court judges in determining an appropriate sanction for the attorney in question. This Court must not allow these results to stand or to continue. *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967); *Ex Parte Garland*, 71 U.S. (4 Walls) 333, 18 L.Ed. 366 (1860). *Matthews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1876).

One of the most egregious examples of the violation of the petitioner's federally guaranteed rights to due process and equal protection in this disciplinary proceeding is represented by the holding of Associate Justice Brown that the Arkansas Supreme Court can effectively ignore the limitation the court itself placed on the sanction of suspensions in its own Procedures. This refusal of the Arkansas Court to follow its own rules is apparently for the purpose of obtaining a conviction of the petitioner on the issues in controversy in this disciplinary proceeding. As noted above, such

determinations clearly violate the federal constitutional standards required for these proceedings. See, *In Re Matter of Thalheim*, 853 F.2d 383, supra. Petitioner was entitled to procedural due process which not only includes notice, but an effective opportunity to be heard in the disbarment or suspension proceeding. Since the petitioner was incarcerated at the time of the Committee's initial hearing in this matter, (petitioner would have been released from prison in less than 45 days), petitioner's constitutionally guaranteed right to be heard in his *quasi-criminal* disbarment or suspension proceeding was violated. See, *In Re Ruffalo*, 390 U.S. 554, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); *Ex Parte Bradley*, 74 U.S. (7 Walls) 364, 19 L.Ed. 214 (1868); *Chambers v. Nasco*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Standing Comm. On Discipline v. Ross*, 735 F.2d 1168 (9th Cir.) cert. denied 469 U.S. 1081, 105 S.Ct. 583, 83 L.Ed.2d. 692 (1984).

The petitioner submits to the members of this Court that the evidentiary record established in this case calls out for, and provides this Court with reason to, review the final judgment of the Arkansas Supreme Court in the petitioner's disciplinary proceeding. Such action should be taken by this Court, notwithstanding the Court's usual practice of extending comity to state courts in their own disciplinary matters, because of the egregious nature of the injuries that have been inflicted by the respondent and the Arkansas courts upon the petitioner and his federally guaranteed rights to due process and equal protection.

D. This Court Must Review the Petitioner's Federal Constitutional Claims, Because the Arkansas Court Has Refused to Do So.

The Arkansas Supreme Court's failure to reach a consensus in this cause (in the form of a majority decision by the members of that court) represents a first in the annals of Arkansas jurisprudence, as far as the petitioner can ascertain. The lack of a definitive decision by the Arkansas Supreme Court is understandable, however, in view of the unwieldy process utilized and the variety of sanctions imposed against the petitioner in four separate trial court hearings in this one proceeding. The final decisions of the circuit court and the Arkansas Supreme Court,

below, declined to consider or rule upon the federal constitutional defenses asserted by the petitioner. The opinion of the two "swing justices" of the Arkansas Supreme Court declined to address the constitutional arguments of the petitioner, since these two justices stated (16 S.W.2d at 235):

> [O]ur Procedures clearly give circuit judges full authority to suspend as the evidence warrants in disbarment matters. This court has found a violation of an attorney's due process rights when that attorney was not notified of a specific rule violation for which he or she might have been sanctioned. See, e.g., Colvin v. Committee on Professional Conduct, 305 Ark. 239, 806 S.W.2d 385 (1991). Here, though, Mr. Wilson was fully apprised of the fact that his sanction might be disbarment. Under these facts it makes little sense to contend that the assessment of a lesser sanction which is authorized by our Procedures violated his right to due process.

Chief Judge Franklin Waters, of the Western District of Arkansas, in his decision (in the federal court "removal action") remanding this cause for trial in the Arkansas state courts in *Neal v. Wilson*, 920 F.Supp 976 (E.D. Ark. 1996), was of the opinion that these federal constitutional issues would be addressed at the state level, and that remand was, therefore, required. The disregard of these federal constitutional defenses presented by the petitioner by, at least, four of the Arkansas Supreme Court Justices in *Wilson VI*, has resulted, at least for the present, the "practical" disbarment of the petitioner in this proceeding.

These state courts have continued to ignore the federal due process and equal protection issues raised by the petitioner regarding double jeopardy, estoppel, laches, and the statute of limitation (*Wilson II*). Though three of the justices addressed the issues applicable to the standard of statutory construction applicable to the disciplinary rules in the regulation of attorneys, these justices did so on a state law basis, ***not on the federal due process and equal protection grounds*** raised by the petitioner for

nearly 10 years. Specifically, four of the justices of the Arkansas court (in *Wilson VI*) totally ignored the strict construction requirement of *In the Matter of Ruffalo* and *In the Matter of Thalheim*, supra.. The Arkansas court also ignored the prohibition, on due process grounds, that prohibits an appeal by the State of an unfavorable decision in a criminal or *quasi-criminal* proceeding. Since this is a *quasi-criminal* matter, allowing the State of Arkansas to have the right to appeal either a favorable or adverse decision of the circuit court violates all types of due process and double jeopardy protections of the petitioner. Other than under the terms of the Procedures of the Arkansas Supreme Court in these disciplinary proceedings, a prevailing party cannot appeal. See *Bynum v. Savage*, 312 Ark. 137, 847 S.W.2d 705 (Ark. 1993).

This Court found in a case from Arkansas, in *Cole v. Arkansas*, 333 U.S. 196 (1948), that the mere opportunity to present constitutional arguments, without a real chance of having those arguments considered, does not constitute an opportunity to be heard, which right is guaranteed by the due process clause of the 14th Amendment to the U. S. Constitution. A review by the members of this Court of the holdings below by the Arkansas state courts on each of the petitioner's causes will reveal that there is a total void in the area of *a holding* by the Arkansas courts relative to the protections afforded to the petitioner by the federally guaranteed rights of due process and equal protection. This *nonaction* by the Arkansas courts constitutes the ultimate perversion of due process, as such federally guaranteed rights apply to the petitioner in this attorney disciplinary proceeding.

E. The Rules of Construction for State Court Disciplinary Rules and Procedures Must be Governed by Federal Constitutional Standards.

It has been contended during the course of this disciplinary process that the petitioner, because he is an African-American, an activist in his community, and an advocate of civil rights and civil liberties for African-Americans and the poor, is, in fact, being subjected to sanctions in this disciplinary proceeding because of his racial identity and his political views. Without there being a denial or affirmance by the courts of Arkansas of the constitutional

protections asserted by the petitioner herein, the context of petitioner's arguments readily avail themselves to the point that the Procedures of the Arkansas Supreme Court in question are over-broad and also stand in violation of the rights guaranteed to the petitioner by the provisions of the First Amendment to the United States Constitution. Without there being a system for attorney discipline that has structure, limitation or restriction on sanctions, an attorney in Arkansas is subject to a very broad array of different sanctions and the application of the Procedures by the state's courts in a manner that defies reality. See *Broderick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Without there being the necessary structure and limitations for the system of attorney discipline adopted by the Arkansas Supreme Court, and without a reference by the presiding judge in this contested attorney disciplinary proceeding to the ABA's Model Standards for Imposing Lawyer Sanctions (Sections 9.22 and 9.32), there is now way for the petitioner or any other of Arkansas' practicing attorneys to be able to tell what aggravating and mitigating circumstances served as a basis for the circuit court's determination in this disciplinary proceeding that cause the circuit judge to finally determine that a five (5) year period was an appropriate suspension sanction for the petitioner, as opposed to 15 or even 50 years. With *only* the exercise of the unlimited discretion of the circuit judge to rely upon, arbitrarily unfair (i.e. unconstitutional) results are bound to occur in these attorney disciplinary proceedings..

The salient language of the fifth circuit court of appeals in the *In Re Matter of Thalheim*, 853 F.2d, at 390, supra, echos again in the instant cause, as we quote:

> When a court undertakes the sanction of an attorney for violating court rules, it is encumbered among sanctioning the court to observe scrupulously its own rules of disciplinary proceedings. If the rules are inadequate, the court can proceed to amend them. But unless and until such an amendment of rules occur, attorneys have a right to rely on the rules. A court cannot ignore

and circumvent its own rules at will to detriment of those covered by them.

In the present cause, it is the contention of the petitioner that Section 7 of the Arkansas Procedures limited the suspension of the petitioner to one (1) year. In view of the fact that petitioner had already been separated from the practice of law (by a prior erroneous decision of the presently presiding circuit court judge) for about 18 months, at the time of the subsequent finding, on remand, that he should be suspended for five (5) years, the petitioner respectfully submits that he has already served a suspension from the practice of law in Arkansas that exceeds the periods of time for a suspension sanction, as expressly set forth in the applicable Arkansas Procedures (Appendix 9) adopted by the Arkansas Supreme Court, itself.

The Arkansas Supreme Court, being a thoroughly divided panel below in *Wilson VI*, let stand the five (5) year suspension sanction determined by the specially appointed judge of the circuit court. Thus, by pure default, the Arkansas Supreme Court adopted the ruling of the circuit court on the "sanction" issue. The determination on the five (5) year suspension sanction was made on by the circuit court, in the first place, through the exercise of that state court judge's unfettered and unbridled discretion. The Arkansas Supreme Court has now held that such a holding is permissible, under the provisions of Rule 5.G(2) of the Procedures, irrespective of the limitations on the length of such sanction as appears in Section 7.A(3) of the Procedures. This holding by the state court should be overturned by this Court because a *quasi-criminal* proceeding is subject to the same due process limitations and protections, as are the restraints on state courts in purely criminal proceedings. *In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed2d 527 (1967); *Little v. Streater*, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981).

The State of Arkansas argues that, since the petitioner was charged with a Rule 8.4(b) violation and "could have been" disbarred, infinitum, that any less sanction that was imposed (that was less than disbarment) therefore comes within the constitutional approval of the 14th Amendment. Petitioner maintains that this is

an specious argument. Taking this argument to its illogical conclusion, the State is saying it has literally the power of "professional" life or death of all attorneys who come within its system, and, regardless of the degree of culpability or the degree of guilt, that the imposition of any sanction by the circuit courts of Arkansas in an attorney disciplinary proceeding that is less than the professional "death penalty" of disbarment, that such determination comes within a "safe harbor" of constitutional compliance, as for as the due process and equal protections provisions of the 14th Amendment are concerned. The petitioner respectfully rejects such legal reasoning and urges the members of this Court to do the same.

The Arkansas Supreme Court must be required by the order of this Court to construe its Model Rules and Procedures on attorney disciplinary matters in the same constitutional manner applicable to the construction of legislative enactments. The Arkansas Supreme Court's power to adopt procedural rules is the equivalent of the Arkansas General Assembly's power to enact legislation. *See, Supreme Court of Virginia v. Consumers Union, Inc.* 446 U.S. 719 (1980). Therefore, as held by the fifth circuit in *In the Matter of Thalheim*, supra, it is clear that attorney disciplinary proceedings, especially those relating to disbarment and suspension cases, "are quasi-criminal in character and the same type of federal constitutional standards are applicable. Accordingly, the petitioner submits that that state court's disciplinary rules must be read strictly, resolving any ambiguity in favor of the attorney.

In summation, the Petitioner submits to the members of this Court that the most egregious violation of the federally guaranteed rights of due process and equal protection (that is inherent in the system established by the Arkansas Supreme Court for attorney discipline) is the allowance by that court (in *Wilson VI*) of the unlimited and unfettered exercise of discretion by the judges and justices of the Arkansas courts in determining appropriate sanctions in attorney disciplinary matters. This very permissive holding by the Arkansas Supreme Court will allow such exercise of discretion by the circuit court judges of the state to have the very real opportunity to run rampant, uncontrolled and,

therefore, to result in the determinations of sanctions that will be in violation of the federal standards required by the due process and equal protection provisions of the 14th Amendment. This case presents a situation that cries out for the intervention of this Court, under the rationale of its must recent ruling in *City of Chicago v. Morales,* 527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999); as well as the Courts earlier decisions in *E. G. Cox v. Louisiana*, 379 U.S. 536 (1995); *Strickner Poultry Corp. v. U.S.*, 295 U.S. 495 (1935); *Smiley v. Kansas*, 196 U.S. 447, 455, 25 S.Ct. 289, 49 L.Ed. 546 (1905); *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

CONCLUSION

The system of rules and regulations formally adopted by the Arkansas Supreme Court, in its Model Rules and Procedures for the disciplining of attorneys, is no less important to our system of justice than fair and consistent administration of the criminal justice system. Under the United States Constitution, no person would be allowed to be sentenced by a criminal court judge to a term in prison that would be in excess of the defined limits set out for the offense in a statute. Neither should an attorney be allowed to be sentenced to a sanction that is beyond the penalty set out in a specific rule adopted by the Arkansas Supreme Court for the implementation of this disciplinary process. There is an extraordinary voluminous evidentiary and pleading record that has been established in this attorney disciplinary proceeding, over the last 10 years, in the courts below. Therefore, the petitioner submits that his *petition a writ of certiorari* in this case presents this Court an extraordinary opportunity to review an expansive and well developed record and then render a landmark decision on the constitutional questions presented here, regarding the disciplining of attorneys in the several states by the courts of those states..

The petitioner asks the members of this Court to note that President William Jefferson "Bill" Clinton has been charged with violating the same provisions of this same Model Rule 8.4(b), and that President Clinton is now the subject of a complaint for disbarment filed by this same respondent, under this same attorney disciplinary system created by the Arkansas Supreme Court, which

system has treated the petitioner so unfairly and unconstitutionally. As this Court has aptly stated in previous cases regarding the President, and we paraphrase, *no one is above the law, including the President.* This Court can now say, by reviewing this case, that no one is below the law, including the petitioner and the President. See, *Resolution Trust Corporation v. Bright*, 6 F.3d 336 (5th Cir. 1993). The right of practicing attorneys to enjoy the federally guaranteed rights of due process and equal protection should not be considered by this Court to be any less than these same federal constitutional rights that this Court has held, many times before, apply to these attorneys' clients in similar factual settings.

Leaving the range of punishments and sanctions for attorneys in disciplinary proceedings solely to the unbridled discretion of the circuit judges or the justices of the Arkansas state court system could (and the petitioner asserts has) lead to the result where an attorney in West Memphis, Arkansas can receive a letter of reprimand or six months suspension for an action in violation of the Model Rules, and where an attorney in Fort Smith, Arkansas can be disbarred for the exact same conduct. This is because there are now no precise standards that exists in the Procedures that are part of the system of attorney discipline created by the Arkansas Supreme Court.

Petitioner, therefore, urges the members of this Court that the *petition for a writ of certiorari* be granted by this Court and that the Court take this opportunity to render an opinion that delineates the applicability of the federal due process and equal protection protections to the compelling facts presented in this unique attorney discipline proceeding that has been brought against the petitioner.

Respectfully submitted,

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APPENDIX 1

WILSON V. NEAL
16 S.W.3d 228, 341 Ark. 282 (Ark. 2000)

Supreme Court of Arkansas.

Jimmie L. WILSON
v.
James A. NEAL.
No. 99-103.
May 11, 2000.

COUNSEL

George Hairston, New York, NY; Roy C. Lewellen, Marianna; and Wilson & Valley, by: E. Dion Wilson, Helena, for appellant.

Robert J. Donovan, Marianna, for appellee.

OPINION

LEAD
ROBERT L. BROWN, Justice.

This case involves the discipline of an attorney, appellant Jimmie L. Wilson, where a majority of justices has been unable to agree on a single ground for reversal on the core issue of the proper sanction. Thus, the decision of the circuit judge is affirmed, and the opinions of this court have no precedential value.

The circuit judge determined that Mr. Wilson should be suspended from the practice of law for five years with credit given for the time he was previously disbarred from practice by this court. Two issues have been raised by Mr. Wilson in his appeal: (1) the circuit judge erred in failing to recuse in this matter; and (2) the five-year suspension ordered by the circuit judge exceeded

the permissible sanction under our rules. Appellee James A. Neal as executive director of the Supreme Court Committee on Professional Conduct has cross-appealed on the basis that disbarment is the appropriate sanction. On two of the three issues, a majority of the court agrees. All seven justices agree that the circuit judge's decision not to recuse was not an abuse of discretion. Justice Brown, Justice Imber, Justice Thornton, Justice Smith, and Special Justice Burnett agree that the circuit judge's denial of disbarment should be affirmed.

As already stated, a majority of the court does not agree on the appropriate sanction for Mr. Wilson. Justice Thornton, Justice Smith, and Special Justice Burnett conclude that the circuit judge was limited to a one-year suspension under the Procedures then in effect with credit given for the period when Mr. Wilson was precluded from practicing law. Justice Brown and Justice Imber agree with the circuit judge that a five-year suspension is appropriate with credit given for the period when Mr. Wilson was precluded from practicing law. Chief Justice Arnold and Special Justice Shell conclude that disbarment is the appropriate sanction. Because a majority does not agree to reverse or modify the sanction imposed by the circuit judge, his decision is affirmed.

The opinion by Justice Brown affirming the circuit judge on all three issues is presented first followed by the opinion of Justice Smith in favor of a one-year suspension and the opinion of Chief Justice Arnold in favor of disbarment.

The conduct of Mr. Wilson at issue occurred almost twenty years ago. Disbarment proceedings have been ongoing for ten years. This is the fifth appeal we have had in the case. See Wilson v. Neal, 332 Ark. 148, 964 S.W.2d 199 (1998) (Wilson IV); Wilson v. Neal, 329 Ark. 125, 947 S.W.2d 338 (1997) (Wilson III) (per curiam); Neal v. Wilson, 321 Ark. 70, 900 S.W.2d 177 (1995) (Wilson II) (per curiam); Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994) (Wilson I); see also Neal v. Wilson, 112 F.3d 351 (8 th Cir.1997) [**285] and Neal v. Wilson, 920 F.Supp. 976 (E.D. Ark.1996). In Wilson I, we reversed the circuit judge who had found that Mr. Wilson's disbarment was barred by the

statute of limitations, and we remanded for further proceedings. In Wilson II, we granted a writ of certiorari and held that then circuit judge Olly Neal lacked the authority to sanction Mr. Wilson because a special circuit judge had been assigned to hear the case. In Wilson III, we denied Mr. Wilson's mandamus petition to include the federal record as part of his disbarment appeal. In Wilson IV, we reversed the disbarment order of the circuit judge and remanded the matter to that judge for him to consider the aggravating and mitigating standards of the American Bar Association in deciding the appropriate sanction.

The genesis of this matter was a disbarment complaint filed by the Arkansas Committee on Professional Conduct ("Committee") on October 9, 1991, after Mr. Wilson pled guilty to five misdemeanor offenses in federal district court as a result of a plea bargain with the United States Attorney. The criminal conduct involved had occurred ten years earlier in 1981 and 1982. The guilty pleas took place on August 22, 1990. Mr. Wilson pled guilty to three counts of violating 18 U.S.C. § 658 by "knowingly" disposing of soybeans and rice that were mortgaged and pledged to the FmHA, and two counts of violating 18 U.S.C. § 641 by "knowingly" taking money from a Department of Agriculture bank account and using it for unapproved purposes. (FN1) In 1985, the United States District Court suspended his license to practice law in the federal courts pending final resolution of any disciplinary action against him by the Committee and by this court. As a result of his guilty pleas, he served four and one-half months in federal prison.

This court affirmed the fact that Mr. Wilson violated Rule 8.4(b) of the Model Rules of Professional Conduct in Wilson IV. There, we held:

Although all five crimes were misdemeanors, we agree with the trial court that these convictions involved dishonesty and a breach of trust, and seriously undermined "the confidence of the public in our legal profession." See In Re Lee, 305 Ark. 196, 806 S.W.2d 382 (1991). Because we have no hesitation in holding that Wilson's convictions reflected adversely on Wilson's fitness to

practice law, we affirm the trial court's finding that Wilson violated Model Rule 8.4(b).

332 Ark. at 161, 964 S.W.2d at 205-206. However, with regard to the appropriate sanction we concluded that the circuit judge had erred in finding that a violation of Model Rule 8.4(b) automatically required disbarment. We directed the circuit judge to evaluate and weigh certain aggravating and mitigating standards adopted by the American Bar Association in deciding the proper sanction. On remand, the circuit judge ordered that Mr. Wilson be suspended from the practice of law for five years, but he made no findings on specific aggravators and mitigators. This five-year suspension is the sanction before us in this appeal, as is the Committee's cross-appeal for disbarment.

I. Recusal

The pleadings filed subsequent to remand included a motion by Mr. Wilson to the circuit judge requesting that the judge recuse because of bias. He asserts that in the proceedings prior to the last appeal, the circuit judge showed that he had no intention of adjudicating sanctions, and that he was committed to disbarment. Mr. Wilson asserts that the judge's promise of a sanction hearing in the proceedings prior to his last appeal, and his failure to provide one in the prior proceedings, showed a predisposition to refuse to adjudicate sanctions, and that the judge's additional conclusion in his decision in the prior proceedings that the undisputed facts dictated disbarment, showed that the judge intended to disbar Mr. Wilson regardless of law or fact.

Mr. Wilson also argues that comments by the circuit judge in his decision on the motion to recuse, and in his discussion on the motion for reconsideration, further show that the judge's prejudice remained unchanged and that a severe sanction was certain. He asserts that the order denying the recusal motion exhibits overt bias when the judge stated he took "umbrage" at the suggestion Mr. Wilson had been deprived of earning a living for two years. Mr. Wilson also cites as error a discussion between the judge and counsel on the day of the sanction hearing, when the motion for

reconsideration was discussed. In response, the judge stated the word "umbrage" was intended to convey his disappointment at the allegation that Mr. Wilson had been deprived of making a living by the judge rather than as a personal insult.

There is a presumption of impartiality on the part of judges. Black v. Van Steenwyk, 333 Ark. 629, 970 S.W.2d 280 (1998). Moreover, the decision to recuse is within the trial court's discretion and will not be reversed absent abuse. Trimble v. State, 336 Ark. 437, 986 S.W.2d 392 (1999). The question of bias is usually confined to the conscience of the judge. Black v. Van Steenwyk, supra; Dolphin v. Wilson, 328 Ark. 1, 942 S.W.2d 815 (1997). An abuse of discretion can be shown by proving bias or prejudice. Massongill v. County of Scott, 337 Ark. 281, 991 S.W.2d 105 (1999); Trimble v. State, supra. To decide whether there was an abuse of discretion, we review the record to see if any prejudice or bias was exhibited. Black v. Van Steenwyk, supra; Dolphin v. Wilson, supra. There is a duty not to recuse where no prejudice exists. Massongill v. County of Scott, supra; U.S. Term Limits, Inc. v. Hill, 315 Ark. 685, 870 S.W.2d 383 (1994); Carton v. Missouri Pac. R.R., 315 Ark. 5, 865 S.W.2d 635 (1993). The party seeking disqualification bears the burden of proving bias or prejudice. Trimble v. State, supra; Dolphin v. Wilson, supra; Noland v. Noland, 326 Ark. 617, 932 S.W.2d 341 (1996).

In the instant case, following remand the circuit judge appeared to hear the evidence presented in an impartial manner giving each side full opportunity to address the issues. The judge acknowledged that Mr. Wilson was an officer of the court and spoke positively of his achievements. While the judge's use of the word "umbrage" in its written order denying recusal may not have been the best choice of words, it in no wise was prejudicial or exhibited bias. Moreover, Mr. Wilson cites no example of bias at the hearing, and thus he demonstrates no prejudice. In the absence of a showing of prejudice, we hold that the circuit judge did not abuse his discretion in declining to recuse.

II. The Sanction

As already noted, Mr. Wilson violated Rule 8.4(b), which is the commission of a "criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." His conduct constitutes serious misconduct which warrants either terminating or restricting his law license for a period of time under Section 7 of the Procedures Regulating Professional Conduct ("Procedures"). Under the American Bar Association Standards for Imposing Lawyer Sanctions, the distinction in the propriety of assessing disbarment versus suspension is drawn as follows:

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

Compendium of Professional Responsibility Rules and Standards §§ 5.11, 5.12 (1999 Ed.).

It would seem at first blush that Mr. Wilson's criminal conduct militates more in favor of disbarment than suspension. But as already noted, in Wilson IV this court made it clear that automatic disbarment was not appropriate and that aggravating and mitigating circumstances must be looked to in deciding the proper sanction. Those circumstances are:

Aggravating Factors:

(a) prior disciplinary offenses;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses;

(e) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with [the] rules or orders of the disciplinary agency;

(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

(g) refusal to acknowledge [the] wrongful nature of [the] conduct;

(h) vulnerability of [the] victim;

(i) substantial experience in the practice of law;

(j) indifference to making restitution;

(k) illegal conduct, including that involving the use of controlled substances.

Mitigating Factors

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify [the] consequences of [the] misconduct;

(e) full and free disclosure to [the] disciplinary board or cooperative attitude towards [the] proceedings;

(f) inexperience in the practice of law;

(g) character or reputation;

(h) physical disability;

(i) mental disability or chemical dependency including alcoholism or drug abuse when;

(1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;

(2) the chemical dependency or mental disability caused the misconduct;

(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

(j) delay in [the] disciplinary proceedings;

(k) impositions of other penalties or sanctions;

(l) remorse;

(m) remoteness of prior offenses.

Model Standards for Imposing Lawyer Sanctions §§ 9.22 and 9.32 (1992).

Of the mitigating factors, the following appear relevant to this case:

absence of a prior disciplinary record;
reputation;
delay in [the] disciplinary proceedings;
imposition of other penalties or sanctions.

Mr. Wilson had ample letters of recommendation from community leaders. He has also engaged in public service since his misdemeanor convictions both in terms of public interest litigation and service in the Arkansas General Assembly. But two circumstances appear particularly pertinent--delay in the disciplinary proceedings and imposition of other penalties and sanctions.

The conduct of Mr. Wilson at issue in this appeal occurred almost twenty years ago. Ten years ago, he admitted his guilt to five misdemeanors based on a plea agreement and served time in prison. He stated in his testimony before the circuit judge in the instant case that he lost his farm as part of the punishment. Since 1985, with the exception of a few months, he has been suspended from practicing law in the federal courts. He was disbarred from practice in the state courts following the decision of the circuit judge prior to the appeal in Wilson IV for more than two years. These formal disciplinary proceedings have been going on now for ten years. There is no doubt that Wilson has already experienced significant penalties and sanctions for his conduct.

We note in addition that certain aggravating factors are absent in this case. Mr. Wilson's misdemeanor pleas were for conduct perpetrated against the federal government and not for conduct against a vulnerable and susceptible client. While this does not excuse Mr. Wilson's conduct, it eliminates an aggravator that might have otherwise been present. Nor do we glean from the record that Mr. Wilson engaged in a bad-faith obstruction of the disciplinary proceedings or that he engaged in deceptive practices before the Committee.

Taking all of these circumstances under consideration, the circuit judge was correct that disbarment was not an appropriate sanction. However, any decision along these lines must be measured against the yardstick of Neal v. Hollingsworth, 338 Ark. 251, 992 S.W.2d 771 (1999), because in that case we found disbarment to be the appropriate sanction after considering for the first time the American Bar Association standards for mitigators and aggravators. In the Hollingsworth case, the embezzlement of money from a client was involved. There are many aspects in this case that distinguish it from Hollingsworth. In Hollingsworth, the circuit judge found (and we agreed) that Hollingsworth had knowingly diverted funds for his own use from an estate whose primary beneficiary was a vulnerable widow (an aggravating circumstance) and then had tried to cover up the diversion of funds by not answering his client's questions or giving her the requested accountings. This conduct occurred more recently than Mr. Wilson's and for a significant period of time--more than five years--from 1989 to 1994. The result of this conduct was a finding by the circuit judge that Hollingsworth had committed eight rule violations:

Rule 1.1 --Competence
Rule 1.3 --Diligence
Rule 1.4(a) --Communication
Rule 1.5(a)(b) --Fees
Rule 1.15(a)(b)(c) --Safekeeping Property
Rule 3.2 --Expediting Litigation
Rule 4.1 --Truthfulness in Statements to Others
Rule 8.4(c)(d) --Misconduct

In the case before us, there was also a pattern of misconduct but for a shorter period of time, and it involved a victim (the government) that was not a vulnerable client. In addition, Mr. Hollingsworth termed his misconduct a "technicality" while Mr. Wilson pled guilty to his wrongdoing. There is also the point that Mr. Wilson's public interest litigation and public service in the General Assembly occurred after his misconduct. Mr. Hollingsworth's misconduct occurred after much of his public service and after he had been a licensed attorney for more than nineteen years.

The fact that Mr. Hollingsworth was never charged with embezzlement and Mr. Wilson was charged with a crime is not a critical distinction. The findings of the circuit judge in Hollingsworth equate to a finding of embezzlement and a coverup, though Hollingsworth was never charged, perhaps due to the reluctance of the widow to bring charges. In short, the circumstances surrounding Mr. Hollingsworth's conduct, which amounted to stealing from an estate for more than five years, where his client, the widow, was the executrix and primary beneficiary, appear more dire and pronounced than Mr. Wilson's wrongdoing against the government for a shorter period of time.

The remaining issue is whether Mr. Wilson should be suspended for a period of years or disbarred for a period of years. This court does have precedent for meting out a disbarment sanction for a fixed term of years. See Weems v. Supreme Court Committee on Professional Conduct, 257 Ark. 673, 523 S.W.2d 900 (1975) (disbarment assessed by circuit judge reduced by this court to a term of three years). Though Mr. Wilson equates a five-year suspension to disbarment in his brief on appeal, the distinction between suspension and disbarment is obviously a critical one. Following a suspension for a term of years, an attorney may apply for reinstatement under Section 7K of our Procedures, which entails little more than showing the Committee that his license fees are current and that he did not practice law during the period of suspension. Following disbarment, however, an application for readmission to the bar made to the Board of Law Examiners as well as approval by this court are required and that

is much more onerous. See Procedures § 7L. This is comparable in effect to an initial application to practice law and entails a character and fitness evaluation by the Board of Law Examiners and even, in some cases, taking the bar exam again.

Additionally, when a disbarment is based on dishonesty, readmission is an impossibility. Section 7L(2)(c) of the Procedures provides that readmission shall not be allowed if:

(c) Any of the grounds found to be the basis of a disbarment or any grounds presented in a voluntary surrender of law license are of the character and nature of conduct that reflects adversely on the individual's honesty or trustworthiness, whether or not the conviction of any criminal offense occurred.

As already noted, this court affirmed the fact that Mr. Wilson's conduct involved dishonesty and reflected adversely on his fitness to practice law in Wilson IV. Thus, our procedures slam the door on any potential readmission by Mr. Wilson, even if his disbarment is only for a term of years.

Finally, it is necessary to address two other opinions in this case. Justice Smith agrees that disbarment is not an appropriate sanction. He maintains, however, that our Procedures should be construed so as to limit the circuit judge and this court to a one-year suspension. That is not a correct reading of our Procedures. Under the Procedures in force in 1990, they provided that the Committee was authorized to suspend an attorney from the practice of law for one year. (FN2) But, a separate section of the Procedures sets forth the authority of the circuit judge as opposed to the Committee, once a disbarment action has been filed in that court. If a finding is made that one or more of the Model Rules of Professional Conduct have been violated, the circuit judge in a disbarment action "shall caution, reprimand, suspend, or disbar such attorney as the evidence shall warrant." 1990 Procedures, § 5G. (2). Thus, the whole panoply of sanctions is available to a circuit judge and, concomitantly, to this court. And there is no basis for concluding that because the Committee can suspend a lawyer from the practice for up to one year, circuit judges are similarly limited when meting out sanctions in a disbarment action. Our rules are so clear on this point that there is no valid basis for

invoking the canons of statutory construction, as Justice Smith has done. To do so takes a limitation on the Committee's power and impresses it on the circuit judges in disbarment proceedings, which was never contemplated by our Procedures. In sum, the circuit judge in this case had the authority to suspend Mr. Wilson from the law practice for five years.

Nor do I see that Mr. Wilson's due process rights were jeopardized by imposition of a sanction (five-year suspension) of which he contends he had no notice. Again, our Procedures clearly give circuit judges full authority to suspend as the evidence warrants in disbarment matters. This court has found a violation of an attorney's due process rights when that attorney was not notified of a specific rule violation for which he or she might have been sanctioned. See, e.g., Colvin v. Committee on Professional Conduct, 305 Ark. 239, 806 S.W.2d 385 (1991). Here, though, Mr. Wilson was fully apprised of the fact that his sanction might be disbarment. Under these facts it makes little sense to contend that the assessment of a lesser sanction which is authorized by our Procedures violated his right to due process.

Finally, there is the dissenting opinion of the chief justice which favors total disbarment. The dissent falls into the same trap as the circuit judge in Wilson IV and fails to consider the ABA standards for aggravating and mitigating circumstances. In particular, the dissent discounts the aggravating circumstances of a vulnerable client and a coverup, which were present in Hollingsworth but not in the instant case. There is, too, the point that Mr. Hollingsworth was found to have violated eight of our Model Rules for more than five years. Mr. Wilson was found to have violated one. Of course, it is vastly easier to look at Mr. Wilson's conduct and say that dishonesty was involved twenty years ago and, thus, permanent disbarment is warranted, without examining the mitigating and aggravating factors in this case. That, however, is contrary to what we held in Wilson IV, where we stated that the circuit judge, and by necessity this court as well, must look to all the circumstances of each case.

GLAZE and CORBIN, JJ., not participating.

ARNOLD, C.J., THORNTON and SMITH, JJ., and Special Justices JAMES E. BURNETT and JAY F. SHELL concur in part and dissent in part.

CONCURRING & DISSENTING

W.H. DUB" ARNOLD, Chief Justice, concurring in part; dissenting in part.

I respectfully disagree with my fellow justices that disbarment is not the appropriate sanction in this case. The appropriate sanction is not only important to the appellant in this case, Mr. Wilson, but it is ultimately important to the entire legal profession, in that this court has previously held that appellant's conduct constituted a violation of Rule 8.4(b) of the Model Rules of Profession Conduct, which regards the commission of a "criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects." See Wilson v. Neal, 332 Ark. 148, 964 S.W.2d 199 (1998) (noted as Wilson IV by my colleagues). Mr. Wilson was convicted of five counts of "knowingly" converting money and property that belonged to the federal government in violation of the law. This court agreed with [*236] the trial court that these convictions, even though they were misdemeanors, involved dishonesty and a breach of trust, and seriously undermined "the confidence of the public in our legal profession." Id. at 161, 964 S.W.2d at 205-06, (quoting In re Lee, 305 Ark. 196, 806 S.W.2d 382 (1991)).

The power to regulate and define the practice of law is a prerogative of the judicial department as one of the divisions of government. See Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994); Weems v. Supreme Ct. Comm. on Prof. Conduct, 257 Ark. 673, 523 S.W.2d 900 (1975), reh'g denied, 257 Ark. 685-A, 523 S.W.2d 900 (1975). Our responsibility is set forth explicitly in Amendment 28 to the Arkansas Constitution, which states: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." This court accepted the responsibility assigned to it by the Constitution and set the

standards high in order to protect the public, as well as the integrity of the legal profession. We have held that truthfulness, honesty, and candor are "necessary characteristics for establishing a candidate's good moral character and hence his or her fitness to practice law." Shochet v. Arkansas Board of Law Examiners, 335 Ark. 176, 187, 979 S.W.2d 888, 894 (1998) (quoting Application of Jenkins, 467 A.2d at 1088).

Each year, law school graduates who have passed the bar examination appear before the Supreme Court to take the oath of office. A portion of that oath states: "I will, to the best of my ability, abide by the Model Rules of Professional Conduct and any other standards of ethics proclaimed by the courts...." These same graduates are reminded that they have become a part of the legal system and that they must be good stewards for the profession. What example is set when lawyers violate the rules, and the proper sanction is not imposed? Lawyer professionalism will be taking a tremendous toll on public trust and confidence.

Our court has demanded of the lawyers of this State high standards; and, as late at June of last year, in Neal v. Hollingsworth, 338 Ark. 251, 992 S.W.2d 771 (1999), this court held that a violation of trust and dishonesty would not be tolerated. We said in Hollingsworth:

This type of misconduct can only be characterized as serious, substantial, and egregious. Under these circumstances, we hold that the trial court clearly erred when it imposed a mere six-month suspension from the practice of law. The only appropriate sanction commensurate with Mr. Hollingsworth's actions is disbarment.

Id. at 276, 992 S.W.2d at 784.

In the case now before us, my colleagues admit that when applying appellant's conduct to the American Bar Association Standards for Imposing Lawyer Sanctions, disbarment clearly appears to be the appropriate sanction, based on appellant's actions. In light of our decision in Hollingsworth, they attempt to

distinguish and minimize Mr. Wilson's conduct based, primarily, upon the fact that the victim in Wilson's case was merely the government, and not a client, as was the case in Hollingsworth. I find that distinction to be rather offensive, given that the government is the "people"; and those "people" happen to be you and me.

It is hard for me to believe that my fellow justices could conclude that Mr. Wilson's conversion of government property, among other crimes, warrants any sanction less than complete disbarment--particularly in light of our decision in Hollingsworth. I might also point out that Mr. Hollingsworth, unlike Mr. Wilson, was neither charged, convicted, nor served time in the [**297] penitentiary for his actions. It is clear that Hollingsworth is, indeed, distinguishable from Wilson; however, in my opinion, Wilson is more egregious than Hollingsworth.

Finally, I must take exception to my fellow justices' logic regarding the reason disbarment for a term of years would be an inappropriate sanction. They state that if this court were to disbar the appellant for a term of years, rather than a lifetime disbarment, that fixed-term disbarment would be tantamount to a complete disbarment, since appellant would have to apply for reinstatement under Section 7K of our Procedures and would never be readmitted because the very basis of his disbarment is conduct involving dishonesty. What? This analysis is illogical.

In other words, it is apparently the opinion of my fellow justices that the appellant should not be disbarred for a term of years, even though his conduct warrants disbarment, because that very conduct would keep him from ever having been admitted to the bar in the first place. What better argument for complete disbarment than that very rationale?--let us not disbar him, because based on his conduct, if we do so, he could never be readmitted to the bar. That is ludicrous and is a pathetic reason for imposing a lighter sanction. I believe my fellow justices have lost sight of the fact that it is a privilege to hold an attorney's license, not a God-given right.

In my opinion, the decision in this case in no way advances the public trust and confidence in our profession. I believe a dangerous precedent is being set, moving the standard which guides the actions of attorneys to a considerably lower level. I, therefore, respectfully dissent.

Special Associate Justice JAY F. SHELL joins.

CONCURRING & DISSENTING

LAVENSKI R. SMITH, Justice, concurring in part; dissenting in part.

I concur with the court that sanctions are warranted. The practice of law is a high privilege, and those who receive that privilege must adhere to the standards of conduct prescribed for the profession. Failure to do so not only warrants but demands appropriate sanction. Two justices are of the view that the circuit court could impose a five-year suspension under the rules in effect in 1990. I disagree and would hold that the better reading of the applicable rules would limit the suspension sanction to one year. Moreover, I believe the preferred policy would be to not favor long-term suspensions. The majority dismisses the need to apply the construction canons to interpret our rules because of their presumed clarity. With respect to sanctions, our rules are not so clear as they suppose when the potential exists for imposition of suspensions for unlimited and perhaps arbitrary terms. The public is not best protected from unscrupulous attorneys by having them remain out of the practice of law for a decade, then potentially return to practice having been apart from the profession for such an extended period. The majority cites no case under the modern rules imposing a five-year or greater suspension from the practice law. Surely, outright disbarment would be a better policy for the public's good as compared to long-term suspension. Here, we have the interesting circumstance where a disbarred attorney could seek reinstatement sooner than an attorney suspended for five years. See, In the Matter of Wayne R. Williams, 265 Ark. 480, 592 S.W.2d 438 (1979). Williams surrendered his license rather than face almost certain disbarment for grossly unethical conduct.

Three years later, he petitioned for and received reinstatement to the practice of law.

A closer examination of the applicable rules is in order. Section 7 of the applicable 1990 procedures is entitled "Sanctions." Paragraph A is entitled, "Sanctions Authorized." Under this section, the Committee is authorized to warn, issue a caution or reprimand, suspend the attorney for one year, or file a disbarment action in circuit court. In this case, the Committee filed an action in circuit court. Once the Committee files a disbarment action, if sanctions are required the sanctions will be imposed by the trial court in accordance with a different section, specifically Section 5(G)(2). Wilson IV, supra. Section 5(G)(2) provides that if the circuit court finds the attorney has violated the "Model Rules, he shall caution, reprimand, suspend, or disbar such attorney as the evidence may warrant."

It is evident that the rules contain two sections regarding sanctions, one describing those available to the Committee, and the other describing those available to the trial court. The list in both sections contains the same categories of sanctions with the exception of the trial court's list, which includes the additional sanction of disbarment.

In Section 7, the Committee's authority to suspend was [**299] expressly limited to one year. (FN3) Section 5(G)(2) dealing with the trial court contains no such limitation. It is indeed proper to ask whether the suspension authority given the trial court in Section 5(G)(2) describing the committee's procedure exceeds that expressly outlined in Section 7. Section 5 of the Committee's Procedure Rules, appearing prior to Section 7 in the rules, specifically addresses the "Procedure" to be followed by the Committee in pursuit of its obligation to investigate and sanction violations. In subsections designated (A) through (H), Section 5 outlines the Committee's general investigatory authority (A), the notice to be given the attorney (B), the response time (C), the manner of voting by committee (D and E), committee hearing procedures (F), the committee's obligation to institute disbarment (G), and the attorney's appeal rights (H). The language addressing

the Circuit Court's authority to sanction appears in (G)(2) and lists four possible sanctions actions--caution, reprimand, suspension, or disbarment. The actions are not defined. Nor are they expressly distinguished from the Committee's sanction list in Subsection 7(A).

While it is clear that the circuit court's responsibility to sanction attorneys in disbarment actions is listed separately in the rules and can include disbarment, it is not as clear whether the court's suspension of an attorney from the practice of law can exceed that stated in the Committee's sanction list in Subsection 7(A). Arguably, in that the circuit court has separate sanction authority stated in 5(G)(2), it could suspend an attorney from the practice for any period of time. Perhaps, the court could suspend an attorney for ten years or even twenty years. We construe our rules using the same means, including canons of construction, as are used to construe statutes. Gannett River States Pub. Co. v. Ark. Jud. Discip. & Disab. Comm., 304 Ark. 244, 801 S.W.2d 292 (1990). The fundamental principle used in considering the meaning of a statute is to construe it just as it reads, giving the words their ordinary and usually accepted meaning. Munson v. State, 331 Ark. 41, 959 S.W.2d 391 (1998).

However, where the applicable statute is penal in nature, i.e., imposes a penalty or punishes conduct, we have long held that it is to be strictly construed. Hughes v. State, 6 Ark. 131 (1845). Moreover[**300] , we have held that in construing such statutes, all doubts are to be resolved in the favor of the defendant and nothing is taken as intended which is not clearly expressed. State v. Lewis, 335 Ark. 188, 979 S.W.2d 894 (1998)

THORNTON, J., and Special Justice JIM BURNETT join.

(FN1.) According to Wilson I, the amount borrowed by Mr. Wilson from the FmHA in 1981 and 1982 was approximately $775,230. A federal grand jury indicted him based on his disposition of the proceeds from multiple crop sales and the transfer of funds from a joint bank account with the FmHA to his law firm account, all in an effort to avoid the FmHA lien. In 1985,

he was tried on various felony counts and found guilty of one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, forty counts of knowingly disposing of property mortgaged to a government agency in violation of 18 U.S.C. § 658, and seven counts of unlawfully converting government property in violation of 18 U.S.C. § 641. His judgment of conviction was reversed by the Eighth Circuit Court of Appeals due to a Batson violation at his jury trial. United States v. Wilson, 815 F.2d 52 (8 th Cir.1987). On remand to the federal district court, Mr. Wilson pled guilty to the five misdemeanors noted in this opinion.

(FN2.) Section 7E(2) of the Procedures now in force, which were adopted by this court in 1998, authorizes the Committee to suspend a lawyer's license "not in excess of two (2) years."

(FN3.) The amended version of this Section now in effect expanded the Committee's authority to suspend up to two years.

APPENDIX 2

SUPREME COURT OF ARKANSAS
JUSTICE BUILDING
625 MARSHALL STREET
LITTLE ROCK, ARKANSAS 72201

June 22, 2000

Mr. E. Dion Wilson
Attorney at Law
423 Rightor Street
Helena, AR 72342

Mr. Robert J. Donovan
Attorney at Law
PO Box 646
Marianna, AR 72360

Re: Jimmie L. Wilson v. James A. Neal, as Executive Director of the Supreme Court Committee on Professional Conduct Arkansas Supreme Court No. 99-103

Gentlemen:

In regard to my dissent in the above matter which was handed down on May 11, 2000, the following change has been made in the third full paragraph on page 3:

> "It is hard for me to believe that my fellow justices could conclude that Mr. Wilson's conversion of government property and conspiracy to defraud the Federal Government of well over $700,000, among other crimes, warrants any sanction less than complete disbarment . . ." has been changed to read as follows:

> "It is hard for me to believe that my fellow justices could conclude that Mr. Wilson's conversion of government property, among other crimes, warrants any sanction less than complete disbarment. . ."

Thank you for your attention to this matter,

Sincerely,

/s/ W. H. "Dub" Arnold
W. H. "Dub" Arnold

mw
cc: All Justices

APPENDIX 3

OFFICE OF THE CLERK
SUPREME COURT OF THE STATE OF ARKANSAS
JUSTICE BUILDING
625 MARSHALL STREET
LITTLE ROCK, ARKANSAS 72201

June 29, 2000

E. Dion Wilson
Attorney at Law
423 Rightor Street
Helena, AR 72342

Eugene G. Sayre
Attorney at Law
3400 TCBY Tower
425 W. Capitol Avenue
Little Rock, Ar 72201

Re: 99-103 Jimmie L. Wilson v. James A. Neal

Gentlemen:

The Supreme Court made the following orders in the above styled case today:

"Petition for rehearing is denied."
"Appellant's motion to cite authorities outside of petition is denied."
"Motion of Lake View School District No. 25 of Phillips County, Arkansas, to file amicus curiae brief in support of appellant's petition for rehearing is denied."

Sincerely,

/s/

Leslie W. Steen, Clerk

LWS: rh

cc: Robert J. Donovan
Wand M. McIntosh, Clerk
(CIV-91-147)

APPENDIX 4

NEAL V. WILSON
873 S.W.2d 552, 316 Ark. 588 (Ark. 1994)
• Opinion •

Supreme Court of Arkansas.

James NEAL, as Executive Director of the
Supreme Court Committee on Professional Conduct, Appellant,
v.
Jimmie L. WILSON, Appellee.
No. 93-691.
April 18, 1994.

COUNSEL

Robert J. Donovan, Marianna, for appellant.

Jerry L. Malone, Little Rock, for appellee.

OPINION
LEAD HOLT, Chief Justice.

The appellant, James A. Neal, in his capacity as Executive Director of the Arkansas Supreme Court Committee on Professional Conduct, brings an appeal from the circuit court's order granting appellee Jimmie L. Wilson's motion to dismiss disbarment proceedings on the basis of the running of the statute of limitations. Mr. Neal has raised five points for reversal, arguing that (1) the trial court erred in finding that the disbarment proceeding was barred by the statute of limitations because no statute of limitations is applicable to disbarment proceedings; (2) alternatively, the trial court erred in finding that the disbarment proceeding was barred by the statute of limitations because any applicable statute of limitations had not run; (3) the trial court erred in finding that Mr. Wilson may have altered his position by

agreeing to plead guilty to misdemeanor charges on the assumption that the Committee would take no further action; (4) the trial court erred in finding that rules of professional conduct were being applied that did not exist at the time the misconduct occurred; and (5) this court should hear the case de novo and pronounce such judgment as we may determine should have been pronounced below.

We agree with Executive Director Neal's contention that the trial court erred in finding that the effective rules were those in force at the time of Mr. Wilson's misconduct in 1982 rather than at the time of his guilty plea in 1990 and that the proceeding was therefore barred by the statute of limitations. For this reason, we reverse the trial court and remand this matter for further proceedings. We do not address the remaining issues relating to the circuit court's decision because its order was predicated on the running of the statute of limitations and is consequently limited in this regard. We further decline to pronounce judgment as requested by the Executive Director in his fifth point on appeal.

Facts

In 1981 and 1982, appellee Jimmie L. Wilson, an attorney and farmer, borrowed approximately $775,230 from the Farmers Home Administration, a federal entity, for farm-operating expenses. The loan was secured by an FmHA lien on Mr. Wilson's crops. A federal grand jury subsequently indicted him on various criminal charges relating to the disposition of proceeds from crop sales and the transfer of funds maintained in a joint bank account established [**591] in the names of the FmHA, Mr. Wilson, and his wife.

Following a jury trial in 1985 in the United States District Court for the Eastern District of Arkansas, Mr. Wilson was found guilty of one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, forty counts of knowingly disposing of property mortgaged to a government agency in violation of 18 U.S.C. § 658, and seven counts of unlawfully converting to his own use money belonging to the United States in violation of 18

U.S.C. § 641. He was sentenced to imprisonment for thirty months on the first count and to lesser concurrent terms on the others. The sentence was stayed pending appeal. On May 15, 1985, District Judge G. Thomas Eisele suspended Mr. Wilson from the practice of law in federal court "until final disposition of any disciplinary proceedings commenced in connection with the conviction."

Meanwhile, on May 2, 1985, Darrell F. Brown, attorney for Mr. Wilson, sent the following request to Joe Phillips, Executive Secretary of the Supreme Court Committee on Professional Conduct:

In order that Mr. Jimmy Wilson will be aware of the policy of the Committee resulting from our discussion, I would appreciate you forwarding to me a "To Whom It May Concern" type letter advising that at this time it is the position of the Committee not to revoke the license until the appellate process has been exhausted....

On May 8, 1985, Mr. Phillips responded with the following statement:

It is presently the policy of the Committee on Professional Conduct not to take any action against a licensed attorney who has been convicted of a crime until the appeal process for that attorney is completed.

Mr. Wilson appealed his conviction, which was affirmed by the Eighth Circuit Court of Appeals in U.S. v. Wilson, 806 F.2d 171 (8th Cir.1986).

One of the issues raised in that appeal, based on Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), was whether Mr. Wilson, who is black, had been denied his due process and Sixth Amendment rights due to the government's use of peremptory challenges to strike six of seven black venirepersons. While the Eighth Circuit found no basis for reversal in Batson at that point, the United States Supreme Court opinion in Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) caused the Court of Appeals to vacate its earlier decision and to

remand Mr. Wilson's case for a Batson hearing. U.S. v. Wilson, 815 F.2d 52 (8th Cir.1987).

The District Court held a Batson hearing in July 1987 and concluded that race was not a factor in the government's exercise of its peremptory challenges. In U.S. v. Wilson, 884 F.2d 1121 (8th Cir.1989), the Eighth Circuit, ruling that the prima facie case of discrimination had not been overcome, reversed and remanded the matter for a new trial.

Rather than being subjected to a new trial on the existing felony charges, Mr. Wilson was charged on August 20, 1990, in a five-count misdemeanor information with three counts of converting property mortgaged or pledged to a farm credit agency to his own use in violation of 18 U.S.C. § 658 and two counts of converting public money, property, or records to his own use in violation of 18 U.S.C. § 641. Mr. Wilson appeared before federal District Judge Stephen Reasoner on August 22, 1990, and pled guilty to each misdemeanor count. The plea and its acceptance were conditioned upon the dismissal of all pending felony charges of which Mr. Wilson had previously been convicted. Judgment was entered on December 26, 1990, and Mr. Wilson was sentenced to four-and-one-half months' imprisonment on the first count (§ 658). With respect to the remaining counts, he was placed on probation for a three-year period which was to run consecutively to the jail term. Immediately following entry of the 1990 state conviction, District Judge Eisele issued an order again suspending Mr. Wilson from federal practice "until the final disposition of any disciplinary proceedings commenced in connection with the conviction."

On March 29, 1991, the appellant, James A. Neal, notified Mr. Wilson of a pending complaint before the Arkansas Supreme Court Committee on Professional Conduct ("the Committee"), "predicated on your entry of a plea of guilty to certain criminal offenses on August 22, 1990, in the United States District Court for the Eastern District of Arkansas." Mr. Neal noted that "It [**593] appears the allegations of this complaint come under Rules 8.4(b) and 8.4(c) of the [amended] model rules."

Mr. Wilson's attorney, Darrell F. Brown, in a letter dated April 15, 1991, sought an extension of time for filing a response from April 23, 1991, the twentieth day following notification, until August 30, 1991. Responding by a letter dated April 19, 1991, Mr. Neal granted an extension to May 20, 1991. Mr. Brown mailed another request for an extension on May 16, 1991, which was not received by the Committee until May 20, the final day of the extended period. On June 10, 1991, Mr. Neal advised Mr. Brown that "the request for an additional extension is denied." Moreover, the Executive Director declared, "the complaint is being processed to the Committee for its determination."

By a certified letter dated and mailed on July 22, 1991, Mr. Neal informed Mr. Wilson of the following:

It is the unanimous decision of the Committee that your conduct in this matter violated the Model Rules of Professional Conduct, as amended. It is the further decision of the Committee to institute disbarment proceedings against you on the basis of that conduct.

In lieu of the filing of a disbarment suit, the Committee will give you the opportunity to voluntarily surrender your Arkansas attorney's license....

Mr. Brown responded on behalf of his client in a letter dated July 24, 1991, informing the Executive Director that Mr. Wilson "disagrees with the decision of the committee to institute disbarment proceeding and at this time does not wish to voluntarily surrender." In addition, the appellee's attorney advised the Committee that the matter was still on appeal in the Eighth Circuit Court of Appeals. (The record, however, does not support the attorney's contention.)

On October 9, 1991, Mr. Neal, as Executive Director of the Committee on Professional Conduct, filed a complaint for disbarment in the Phillips County Circuit Court pursuant to Section 6B(1) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, which were adopted on

a trial basis by per curiam order on July 16, 1990. Section 6B(1) requires the Committee to institute a disbarment action when the complaint against an attorney is based on a conviction of a felony or a criminal act that, under the terms of Rule 8.4(b) of the Model Rules of Professional Conduct, reflects adversely on the attorney's "honesty, trustworthiness or fitness as a lawyer in other respects."

Mr. Wilson filed a motion to dismiss for failure to state a cause of action. In the motion, Mr. Wilson asserted that he had not, under the terms of Section 6B(1) of the Procedures, been convicted of a felony and that, within the meaning of the language of Rule 8.4(b), he had not committed a criminal act that reflects adversely on his honesty, trustworthiness, or general fitness as a lawyer. He characterized the conduct to which he had pled guilty as nothing more--apart from the involvement of an agency of the federal government--"than a simple breach of contract."

On December 18, 1991, the Committee filed a motion for summary judgment. Mr. Wilson filed a supplement to his motion to dismiss on February 21, 1992, in which he stated:

6. Rule 8.4(b), the rule which Defendant is accused of violating, was adopted by per curiam order of the Arkansas Supreme Court on December 16, 1985, and became effective on January 1, 1986. These rules apparently replaced the then-existing Code of Professional Responsibility adopted by per curiam order of June 21, 1976 (See 260 Ark. 910), which became effective on July 1, 1976. Consequently, the Model Rule which the defendant is accused of violating was not in existence at the time of the alleged conduct which provides the basis for these disbarment proceedings. (Further, the Procedures, including Sections 5.6 and 6.B. (1), were not adopted until the Arkansas Supreme Court did so on a trial basis by per curiam order of July 16, 1990.)

In addition, Mr. Wilson asserted that disbarment proceedings are civil in nature and are subject to the rules of civil procedure, which entail application of a five-year statute of limitations to offenses which occurred nine to eleven years earlier.

A hearing was held on April 6, 1992. In a letter opinion [**595] dated February 16, 1993, the trial court reiterated its finding at the hearing that the statute of limitations applied. The circuit judge also commented that Mr. Wilson's due process rights would be violated by adherence to rules of professional conduct not in effect at the time the misconduct occurred. He further stated:

The Court is convinced that Mr. Wilson conducted himself in a manner, because of which the committee, had it acted in a more timely fashion, could have disciplined him under an appropriate rule.... [I]t appears that the State Committee ill advisedly waited for the Federal Committee to perform. However, the Federal Committee did suspend Mr. Wilson's privilege of practicing law in the Federal Courts in 1985. Yet, the State Committee still took no position.

Whether it comes under the statute of limitations, laches, waiver or some other legal theory, Mr. Wilson may well have agreed to the misdemeanor charge, after two felony conviction reversals, on the premise that the state was going to do nothing and thus altered his position for several possible reasons.

The State Committee chose to wait too long, and the defendant's motion to dismiss is granted and the State's complaint for suspension is dismissed.

On March 3, 1993, the trial court's formal order of dismissal was filed, along with its letter opinion; based on the reasons set forth in the opinion, and primarily on the application of the statute of limitation, Mr. Wilson's motion to dismiss was granted, and the Committee's complaint was dismissed with prejudice, as well as its motion for summary judgment upon its complaint, which was denied for mootness. A notice of appeal was filed on March 15, 1993.

Standard of review

[1][2] The present appeal arises from the judgment of the circuit court dismissing the complaint for disbarment filed by Mr. Neal on behalf of the Committee. In reviewing a trial court's decision on a motion to dismiss under Ark.R.Civ.P. 12(b)(6), we treat the facts alleged in the complaint as true and view them [**596] in the light most favorable to the party who filed the complaint. Gordon v. Planters & Merchants Bancshares, Inc., 310 Ark. 11, 832 S.W.2d 492 (1992); Battle v. Harris, 298 Ark. 241, 766 S.W.2d 431 (1989). In deciding such motions, the trial court must look only to the allegations in the complaint. Wiseman v. Batchelor, 315 Ark. 85, 864 S.W.2d 248 (1993); Deitsch v. Tillery, 309 Ark. 401, 833 S.W.2d 760 (1992).

Here, the complaint, filed on October 9, 1991, provided pertinent information about Mr. Wilson's pleas of guilty on the misdemeanor charges as well as considerable detail about the conduct that ultimately led to those pleas. Included were the dates 1981 and 1982 for the illegal grain sales and fund transfers as well as the August 1990 plea proceedings. Accepting those dates as true, the circuit court determined that the statute of limitations was applicable and prohibited the Committee from pursuing the disbarment proceeding.

[*557] Judicial authority to regulate practice of law

[3] The power to regulate and define the practice of law is a prerogative of the judicial department as one of the divisions of government. Weems v. Supreme Ct. Comm. on Prof. Conduct, 257 Ark. 673, 523 S.W.2d 900 (1975), reh'g denied, 257 Ark. 685-A, 523 S.W.2d 900 (1975). Our responsibility is set forth explicitly in Amendment 28 of the Arkansas Constitution: "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law."

Statute of limitations and rules of professional conduct

[4] The issues involving the applicability of the statute of limitations and the rules of professional conduct promulgated by this court are closely intertwined. It is, however, unnecessary for

us to address the questions raised concerning the applicability and running of the statute of limitations because the operative Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, adopted (prior to Mr. Wilson's guilty plea) by per curiam order on July 16, 1990, focus upon the fact of conviction rather than the allegation of misconduct. The entire question of the statute of limitations is, therefore, a non-issue. The Committee's action for disbarment, filed on October 9, 1991, was by any definition timely, having followed [**597] Mr. Wilson's plea of guilty on August 22, 1990, by approximately thirteen and one-half months.

[5] This consideration brings us to the Executive Director's fourth point for reversal, in which he asserted that the trial court erred in finding that the rules of professional conduct that were invoked by the Committee in its disbarment action did not exist at the time of the misconduct and, as a result, that Mr. Wilson was denied due process of law.

Implicit in the trial court's letter opinion is the view that the operative rule at the time of Mr. Wilson's misconduct was Rule X of the Rules of the Court Regulating Professional Conduct of Attorneys at Law, 260 Ark. 910 (1976), adopted by per curiam order on June 21, 1976, and made effective July 1, 1976. That rule provided, in relevant part:

If an attorney has been convicted of a felony or infamous crime under the laws of any State or the United States, a charge may be made by complaint filed with the Committee with the Clerk of a Court of proper venue under these Rules.... The sole issue to be determined shall be whether the crime warrants discipline and, if so, the extent thereof....

(Emphasis added.) Rule X afforded the Committee greater discretion in filing a complaint than is now the case, and the conduct in question, consisting of either a "felony" or an "infamous crime," was narrower in scope than at present.

Section 6A of the current Procedures states that:

All prosecuting attorneys and judges participating in or presiding over a hearing in which an attorney is convicted of, pleads guilty to, or pleads nolo contendere to a crime which is a Class A misdemeanor or greater offense, shall have the duty to report such conviction or plea to the Executive Director.

(Emphasis added.) Section 6B(1), under which the Executive Director filed his complaint on October 9, 1991, states, as quoted earlier, that:

When a complaint against an attorney is based on a conviction of a felony or a crime which also violates Rule [**598] 8.4(b) of the Model Rules of Professional Conduct, the Committee shall institute an action of disbarment.

(Emphasis added.)

As Section 6 clearly indicates, it is the conviction, or, as in this instance, the guilty plea, that triggers the mandatory disbarment action against an attorney. Prior to conviction, no such action is required. As a practical matter, the present Procedures emphasize taking action upon actual conviction or pleas of guilty or nolo contendere more so than conducting proceedings independently prior to trial for alleged violations of the Model Rules of Professional Conduct.

In sum, the cause of action did not accrue until August 22, 1990, the date on which Mr. [*558] Wilson entered his guilty plea. As for the 1985 felony conviction, the Committee decided, as a matter of policy stated in its letter of May 8, 1985, "not to take any action ... until the appeal process ... is completed." Granted, the Committee had the option of proceeding at the time the misconduct occurred, but it chose not to do so. Rather, it deferred to the pending federal court matter, as it had a right to do. This deferment inured to Mr. Wilson's benefit, for he was permitted to continue his practice of law in the state courts while his case meandered in its course for some ten years of trial, appeal, and rehearings in the federal system. In any event, Mr. Wilson's 1985 federal felony conviction was overturned and is irrelevant for

purposes of this appeal; we look, instead, to his 1990 conviction as the basis for the Committee's charge.

Rule 8.4(b), which defines "professional misconduct" in part as the commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," and which comprehends the misdemeanor charges to which Mr. Wilson pled guilty, was effective as part of the Model Rules of Professional Conduct on January 1, 1986, having been adopted by per curiam order on December 16, 1985. In the Matter of the Arkansas Bar Association: Petition for the Adoption of Model Rules of Professional Conduct, 287 Ark. 495, 702 S.W.2d 326 (1985). The supplemental Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, under which the Executive Director filed the complaint for disbarment, were effective on July 16, 1990, the date of our per curiam. In the Matter of Procedures of the Arkansas Supreme Court Committee Regulating Professional Conduct of Attorneys at Law, 303 Ark. 725, 792 S.W.2d 323 (1990). Both were controlling when Mr. Wilson pled guilty on August 22, 1990.

In passing, we note that Mr. Wilson's reliance on Sexton v. Supreme Ct. Comm. on Prof. Conduct, 295 Ark. 141, 747 S.W.2d 94 (1988), is misplaced. In that case, attorney Sam Sexton, Jr., was charged with misconduct under the Model Rules that became effective at the beginning of 1986. We held, however, that because the acts in question occurred in 1983, it was a violation of due process to charge Mr. Sexton under a rule that was not in effect at the time of the alleged misconduct. "Due process," we said, "requires notice that an act is punishable at the time it is committed.... It might not matter if the rules were substantively the same, but we find a significant difference between the old rule ... and the new rule...." 295 Ark. at 144, 747 S.W.2d at 96. Still, we held it permissible for the Committee to proceed under the Code of Professional Responsibility, the now-superseded body of rules that was in effect in 1983.

Two factors distinguish the Sexton case from the present appeal. There, attorney Sexton was appealing a one-year

suspension, while here the Executive Director of the Committee on Professional Conduct is appealing the dismissal of a complaint for disbarment. Further, since the Sexton decision was handed down in 1988, this court has adopted the supplementary Procedures that contain the language of Section 6B(1) making a mandatory disbarment action contingent upon "conviction of a felony or a crime which also violates Rule 8.4(b) of the Model Rules of Professional Conduct." (Emphasis added.) We hold that the Sexton case is not controlling under the circumstances.

Wilson's reliance on Committee policy

Mr. Neal maintains, in his third point for reversal, that the trial court also erred in commenting that Mr. Wilson may have altered his position by agreeing to misdemeanor charges in the belief that the Committee would take no action. As noted earlier, we do not reach this issue because the trial court's order focused [**600] on the running of the supposedly applicable statute of limitations, and our inquiry is consequently limited in scope to that question. Any speculation by the trial court regarding Mr. Wilson's motivation in entering a guilty plea amounted to unverifiable dicta.

Requested pronouncement of judgment

Relying on Section 5H(3) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, Mr. Neal requests that this Court, in its de novo review, "pronounce such judgment as in its opinion should have been pronounced below." He has, however, overlooked a crucial phrase in the section:

Appeals from any action by the Committee after hearing shall be heard de novo on the record and the Arkansas Supreme Court shall pronounce such judgment as in its opinion should have been pronounced below[.]

This appeal arises from a decision of a circuit court and is not governed by Section 5H(3).

The applicable provision, Section 5H(4) follows:

> Appeals from any judgment of a Circuit Court in a disbarment proceeding shall be heard in accordance with the rules governing appeals of civil cases.

Although disbarment proceedings are heard de novo on appeal, Weems v. Supreme Court Committee on Professional Conduct, supra, it would be inappropriate for this Court to render judgment in this case because the appeal is from a motion to dismiss. The matter must be remanded to the circuit court.

Long ago, United States Supreme Court Chief Justice John Marshall, in a disbarment case involving former Vice-President Aaron Burr, observed:

> On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the Court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the Court itself. If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case.

Ex parte Burr, 22 U.S. (9 Wheat.) 529, 530, 6 L.Ed. 152 (1824). See also Hurst v. Bar Rules Committee of the State of Arkansas, 202 Ark. 1101, 155 S.W.2d 697 (1941); Maloney v. State, 182 Ark. 510, 32 S.W.2d 423 (1930); Beene v. State, 22 Ark. 149 (1860). This, as any other disbarment proceeding, is a difficult case for consideration. Yet because the matter was dismissed by

the circuit court, we have no basis for "interposing [our] authority" at this point.

The judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

NEWBERN, J., not participating.

APPENDIX 5

NEAL V. WILSON
900 S.W.2d 177, 321 Ark. 70 (Ark. 1995)

• **Opinion** •

Supreme Court of Arkansas.
James A. NEAL, as Executive Director of the Supreme Court Committee on Professional Conduct, Petitioner,
v.
Jimmie L. WILSON, Respondent.
No. 95-536.
June 12, 1995.

OPINION

LEAD
PER CURIAM.

On October 9, 1991, petitioner filed a disbarment proceeding against the respondent in the Phillips County Circuit Court. Respondent moved to dismiss, contending the statute of limitations had run. By letter dated December 24, 1991, Phillips County Circuit Judge Baird Kinney notified this court that both he and the other circuit judge of the 1st Judicial Circuit had recused from the proceeding involving respondent, and requested a special circuit judge be assigned to hear the matter. Pursuant to Act 496 of 1965, the Chief Justice, on February 18, 1992, assigned Circuit Judge Lance Hanshaw.

On March 3, 1993, Judge Hanshaw entered an order dismissing petitioner's action against respondent based primarily upon the statute of limitations. That order was appealed and [**72] reversed by this court's decision in Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994). The Neal decision was delivered on April 18, 1994, and rehearing was denied on May 23, 1994. By

letter dated April 20, 1994, Judge Hanshaw recused from hearing the case on remand and requested another judge be assigned to hear it. Again, pursuant to Act 496, another circuit judge, Judge John Lineberger of the 4th Judicial Circuit, was assigned on May 3, 1994, to try this case, and to hold all ancillary proceedings. By letter dated May 3, 1994, Judges Hanshaw and Baird Kinney and Phillips County Circuit Clerk, Wanda McIntosh, were notified of Judge Lineberger's assignment. The order assigning Judge Lineberger reflects it was filed with this court's clerk on May 3, 1994, but the order was not filed in the Phillips County Circuit Court proceedings until September 14, 1994. No further activity appears to have occurred in the case until some time in December of 1994, when respondent moved for Judge Lineberger's disqualification.

In respondent's motion suggesting Judge Lineberger's disqualification, he contended that, when Judge Hanshaw had recused, a new circuit judge had taken office who had not recused in this case, and, as a consequence, this proceeding automatically reverted to that circuit judge upon Hanshaw's recusal. (FN1) Judge Lineberger denied respondent's motion on January 5, 1995, and respondent took no subsequent action to contest Judge Lineberger's ruling or jurisdiction in this matter. By letter dated April 26, 1995, Judge Lineberger set a nonjury trial on the merits of the case to be heard on June 13, 1995.

The record next reflects that, on May 15, 1995, a flurry of letters was exchanged between respective parties' counsel. Respondent's counsel notified counsel for petitioner that the new 1st Judicial Circuit Judge, Judge Olly Neal, had two dates on which he could try respondent's case, but petitioner's counsel responded, stating he would not attend a hearing until Judge Neal signed an order assuming jurisdiction of the case. Petitioner was subsequently served with a notice setting a hearing in Judge Neal's court on May 18, 1995. Petitioner appeared on that date, contesting Judge Neal's jurisdiction to proceed in the matter. Judge [**73] Neal ruled he had jurisdiction to proceed and did, by deciding the case on its merits. Judge Neal's order was signed on May 24 and entered on May 25, 1995.

On May 19, 1995, petitioner filed in this court for a writ of certiorari directing that all judgments, orders and rulings made by Judge Olly Neal be declared void since Judge Lineberger had been assigned jurisdiction to try this case. On May 24, 1995, respondent moved to dismiss petitioner's request for certiorari, asserting (1) writs of certiorari are issued to direct a judge to perform a duty and Judge Neal was not made a party to this special action, (2) a petition for writ of prohibition would have been a proper remedy, but is not warranted on the facts of this case, (3) an appeal provides an adequate remedy, and (4) no grounds are recited upon which a writ of certiorari can issue in this matter.

The general rule is that certiorari cannot ordinarily be used as a substitute for appeal. However, this does not mean that actions of trial courts during the course of an action are not subject to review, in a proper case, by a court having supervisory jurisdiction, or that, in the exercise of that jurisdiction, resort may not be had to mandamus, prohibition or certiorari where appellate remedy is unavailable or inadequate. McKenzie v. Burris, 255 Ark. 330, 500 S.W.2d 357 (1973). Even if an appeal is available to petitioners, certiorari, in a court having supervisory jurisdiction, would still lie to quash a judgment which is void on its face, or to control the actions of an inferior tribunal which is proceeding illegally where no other mode of review has been provided. Id.

Here, petitioner asserts Judge Lineberger was properly assigned jurisdiction of this case, and as a consequence, Judge Neal's assumption of jurisdiction of this cause was void. We agree. While respondent complains that Judge Neal had never recused from hearing this case and therefore retained jurisdiction to hear it, that fact was never conveyed to this court at the time Judge Hanshaw's assignment was terminated or when Judge Lineberger was assigned. At the time of Judge Lineberger's assignment, the record reflected the circuit judges in the 1st Judicial District had recused, and the special assigned circuit judge, Judge Lance Hanshaw, had done so as well. Based upon that] record, this court made the new and temporary assignment of Judge Lineberger to this case pursuant to the terms of Act 496, as amended, [codified as Ark. Code Ann. §§ 16-10-101 (Repl.1994)].(FN2) At the latest,

respondent knew (or should have known) of Judge Lineberger's assignment on September 14, 1994--the date the order was filed in this proceeding in the Phillips County Circuit Court Clerk's Office. The principle is well settled that it is the duty of a litigant to keep himself informed of the progress of his case. United S. Assurance Co. v. Beard, 320 Ark. 115, 894 S.W.2d 948 (1995). Nonetheless, respondent waited nearly three months before requesting Judge Lineberger to recuse, and when respondent's request was denied, he never petitioned this court that Judge Lineberger's assignment was improper and lacked jurisdiction. In fact, respondent simply failed to act in any way to apprise this court that Judge Neal had not recused from serving in this case. Nor did he question the validity of Judge Lineberger's assignment until May of 1995, when petitioner filed this original proceeding for certiorari. In other words, respondent waited eight months after Judge Lineberger's assignment was filed in the Phillips County Circuit Clerk's office to notify this court that Judge Neal had not recused in this matter.

Why respondent failed to question Judge Lineberger's assignment earlier is unclear. Regardless, we emphasize the fact that the record before this court at the time of Judge Lineberger's assignment reflects that the circuit judges in the 1st Judicial District had recused from this case, and no party had offered any motion, objection or information to the contrary. It is the parties' or trial court's responsibility to apprise this court as to whether an assignment is necessary under Act 496. Once that assignment is made, that responsibility continues. Clearly, it is not this court's task, on its own volition, to discover or monitor whether the circumstances have changed to warrant the termination of an assignment or reassignment. The mere fact that a new circuit judge had been elected in the 1st Judicial Circuit after Judge Hanshaw's and before Judge Lineberger's assignments did not, in itself, suggest the new circuit judge had not recused from trying this case. Certainly, if respondent had notified this court of Judge Neal's willingness to serve in this matter, this court could have considered that factor in deciding whether a new assignment was required under Act 496. (FN3) Certainly, if respondent had acted earlier, petitioner would also have been afforded an early opportunity to question the propriety (or appearance of

impropriety) of Judge Neal sitting in this matter. Under the circumstances, petitioner was unable to suggest Judge Neal's disqualification until after Judge Neal belatedly attempted to exercise jurisdiction over this case in May of 1995. (FN4)

In sum, we must conclude that the record of this case reflects Judge Lineberger's assignment was valid, and accordingly that assignment gave him jurisdiction to try this litigation. That being so, Judge Neal's attempt to assume jurisdiction and to decide this matter was clearly erroneous and void. The record also reflects Judge Neal knew this case had been assigned to Judge Lineberger, who already had set this cause for trial, but Judge Neal undertook to hear and decide the case anyway. We hold that petitioner has no adequate remedy in these circumstances except certiorari. Judge Lineberger, in exercising appropriate jurisdiction, set this matter for trial on June 13, 1995, and he is necessarily the sole judge having the power and authority to proceed in this cause.

In conclusion, we touch on respondent's brief mention that Judge Neal is a necessary party to the request for certiorari proceeding. He cites no legal authority and even fails to cite or argue ARCP Rule 19, Arkansas's rule concerning the joinder of persons needed for a just adjudication. We have held that, absent convincing argument or citation of authority, we decline to address the response or argument to a petition for certiorari. We would simply state that neither Judge Neal nor Judge Lineberger has an interest related to the subject of this action between petitioner and respondent, and those judges' presence, as parties, has nothing to do with whether complete relief can be accorded in this case. Cf. Bridges v. Arkansas Motor Coaches Limited, Inc., 256 Ark. 1054, 511 S.W.2d 651 (1974); McKenzie v. Burris, 255 Ark. 330, 500 S.W.2d 357 (1973); State v. Nelson, Berry Pet. Co., 246 Ark. 210, 438 S.W.2d 33 (1969) (where petitions for writs of certiorari actions were decided by the court without trial judges being joined as parties). We would also point out that Judge Neal has never requested to be a party to this case.

Because we find Judge Neal has proceeded in excess of his authority and jurisdiction, his directives and orders relating to the

action between petitioner and respondent are quashed. Nelson, Berry Pet. Co., 246 Ark. at 221, 438 S.W.2d at 40.

NEWBERN, not participating.

BROWN and ROAF, JJ. dissent.

DISSENTING

BROWN, Justice, dissenting.

There are too many unanswered questions to allow this matter to go to trial on June 13, and a necessary party, Judge Neal, should be joined as a respondent. I would stay the trial to allow further development and consideration of the issues involved and advance the case for a decision in September.

The question that permeates all aspects of this case is why a special judge, Judge John Lineberger, was appointed to replace Special Judge Lance Hanshaw on May 3, 1994, when a duly elected circuit judge, Judge Olly Neal, who had not recused, was sitting in the district. This appears to have been a mistake. When one special judge recused, the immediate reaction must have been to appoint another special judge without remembering that in the interim a new circuit judge had been elected within the district. It is that apparent mistake that has given rise to much of this controversy.

Turning to the merits, I cannot agree with certain statements by the majority. First, I cannot agree that the record reflects that all circuit judges in the First Judicial District had recused in this case when Special Judge Lineberger was appointed. Judge Neal apparently had not. Further, I question the following conclusion: "The mere fact that a new circuit judge had been elected in the 1st Judicial Circuit after Judge Hanshaw's and before Judge Lineberger's assignments did not, in itself, suggest the new circuit judge had not recused from trying this case." The majority appears to espouse the theory of an implied recusal by Judge Neal at the time of Special Judge Lineberger's appointment because

Judge Neal failed to announce that he was trying the case. That assumption by the majority inspires the question of whether Judge Neal was ever presented with the option of sitting or recusing before Special Judge Lineberger was appointed. The record before us suggests that he was not. That issue is different from the issue of whether Judge Neal later waived his authority by permitting Special Judge Lineberger to proceed with the case. All of this points up the fact that Judge Neal needs to be a party to this original proceeding.

The crux of this case is whether Special Judge Lineberger has already asserted jurisdiction over the matter and, if so, at what point did he do so. For example, did he do so before Respondent Wilson suggested that he disqualify in December 1994? A corollary issue is why did Respondent Wilson not raise the issue of Special Judge Lineberger's lack of authority earlier. Did he waive his rights by not doing so? And, again, does Judge Neal not have a right to be heard in this? After all, it is his authority that is in question.

The majority is undoubtedly right that in certain certiorari cases the trial judge has not been made a party. But this court has also stated most recently that a writ of certiorari is issued to direct a judge to perform a duty. Dougan v. Gray, 318 Ark. 6, 884 S.W.2d 239 (1994). Manifestly, a writ of certiorari issues to prevent a judge from acting in excess of his jurisdiction. Bates v. McNeil, 318 Ark. 764, 888 S.W.2d 642 (1994). This is just such a case. Indeed, the majority has granted the writ, determined that Judge Neal acted in excess of his authority, and vacated his orders without hearing his side of things. That is fundamentally unfair. Judge [**78] Neal is clearly a necessary party under Ark.R.Civ.P. 19. We are on shaky and uncertain ground in my opinion when we remove him from the case without giving him a voice in the matter. I would allow supplemental briefs and advance the case on the docket so that it could be decided in September of this year. The suggestion of a conflict of interest on the part of Judge Neal due to a prior professional relationship with Respondent Wilson has been injected into this matter by Petitioner James Neal. I would allow

an amendment to the petition, should petitioner James Neal choose to do so, and supplemental briefs on this issue also.

Because I would stay the trial, join Judge Neal as a party, permit supplemental briefs, and expedite the matter, I respectfully dissent.

ROAF, J., joins.

ROAF, Justice, dissenting.

There is so much in the majority opinion with which I take issue that it is hard to know where to start, but the holding that Judge John Lineberger was "properly assigned jurisdiction of this case" without any authority or discussion of the inherent underlying conflict between his assignment and the constitutional and statutory authority of the duly elected, sitting circuit judge for the First Judicial District is as good a place as any. The propriety of Judge Lineberger's assignment, and not the refusal of Judge Olly Neal to disqualify is the real issue presently before us, and there is no question that the assignment was made in error.

The majority seems to opine that because this court, through the office of the Chief Justice, had once made a valid assignment of Judge Hanshaw, pursuant to Ark.Code Ann. § 16-10-101(b)(1) (Repl.1994), which grants the Supreme Court general superintending control over the administration of justice in all courts of the state, it retained control over this case regardless of the passage of time and change in circumstances. Indeed, the majority states that it merely would have considered "Judge Neal's willingness to serve in this matter" in making its assignment under Act 496 if respondent had so notified the court. The majority, therefore, does not deem it necessary to discuss the facts surrounding Judge Lineberger's assignment as it relates to the statutory authority of this court to so assign him; I do, and I will.

Judge Lineberger's assignment was apparently triggered by the letter Judge Hanshaw directed to the Administrative Office of the Courts (AOC) on April 20, 1994, in which he expressed

disagreement with this court's reversal of his decision in the initial proceedings between these parties and declined to rehear the case. He asked the AOC to "Please re-assign this case to someone else." Judge Hanshaw's assignment was then terminated by order of this court on April 25, 1994, and Judge Lineberger was assigned to the case by order of this court dated May 3, 1994. The majority construes the initial appointment of Judge Hanshaw on February 18, 1992 and his letter of more than two years later, as some kind of a "record" upon which this court could properly rely in making the reassignment of Judge Lineberger. Indeed, the holding of the majority finds no obligation or responsibility on this court or the AOC other than to react to the "request" of Judge Hanshaw, who has no connection to Phillips County or to the First Judicial District other than his earlier assignment to this case.

We must examine the underlying bases for the authority of both Judge Neal and Judge Lineberger to determine if one will have supremacy over the other. Of course, Judge Neal's authority to hear this case derives from his status as the circuit judge elected by the people of his district. Arkansas Const. art. 7, § 13 provides:

The State shall be divided into convenient circuits, each circuit to be made up of contiguous counties, for each of which circuits a judge shall be elected, who, during his continuance in office, shall reside in and be a conservator of the peace within the circuit for which he shall have been elected.

Further, Ark.Code Ann. § 16-13-903 (Repl.1994) provides that voters of the first judicial district (which includes Phillips County Circuit Court) must elect the judges who preside over all cases arising within the district. Finally, Ark.Code Ann. § 16-13-210 (Repl.1994) provides in part:

Any circuit judge of this state, at any time while mentally and physically competent and physically present in the geographical area of the judicial district which he serves as judge, may hear, adjudicate, or render any appropriate order with respect to, any cause or matter pending in any circuit court over which he presides ...

As to Judge Lineberger's authority, this court has concluded that Ark. Const. art. 7, § 21, providing for the election of special judges, and Ark. Const. art. 7, § 22, permitting circuit judges to temporarily hold court for each other, are the modes expressly set out in the constitution and are exclusive of all other methods of temporarily replacing a circuit judge. Wessell Bros. Drilling Co. v. Crossett Sch. Dist., No. 52, 287 Ark. 415, 701 S.W.2d 99 (1985); Burris, Adm'r v. Britt, Judge, 281 Ark. 225, 663 S.W.2d 715 (1984). Because Judge Lineberger was not elected by the practicing attorneys of Phillips County pursuant to Ark. Const. art. 7, § 21, the only provision under which Judge Lineberger could hold authority to hear the case is Ark. Const. art. 7, § 22. Article 7, § 22, Exchange of circuits, provides:

The judges of the circuit courts may temporarily exchange circuits or hold courts for each other under such regulations as may be prescribed by law.

(Emphasis supplied.) In accordance, Ark.Code Ann. § 16-10-101 provides in part:

(b)(1) Under rules prescribed by the Supreme Court, the Chief Justice may require reports from all courts of the state and may issue such orders and regulations as may be necessary for the efficient operation of those courts to ensure the prompt and proper administration of justice and may assign, reassign, and modify assignments[*183] of judges of the circuit court, the chancery court, and the probate court to hold, upon a temporary basis, regular or special sessions for the transaction of civil or criminal business within any other such court.

(Emphasis supplied.) This court has recognized that if a trial court has problems with congested dockets or conflicts in scheduling, and the prompt and proper administration of justice warrant it, the temporary assignment of judges may be had pursuant to Ark.Code Ann. § 16-10-101 (Repl.1994). (Emphasis supplied.) Arkansas Dep't of Human Services v. Templeton, 298 Ark. 390, 769 S.W.2d 404 (1989); See State v. George, 250 Ark. 968, 470 S.W.2d 593 (1971). Further, where the regular judges of the circuit recuse

from hearing the case, the court may temporarily assign a judge from another circuit. See Burris, supra.

Initially, it may appear that both Judge Neal and Judge Lineberger have authority to hear the matter. In Rowlins v. State, 319 Ark. 323, 891 S.W.2d 56 (1995), this court concluded that Ark. Const. art. 7, § 22 clearly provides that circuit judges may temporarily exchange circuits. The court stated that Ark.Code Ann. § 16-13-403 (Repl.1994) (statutory procedure for exchange) merely implemented that constitutional mandate and did not conflict with Ark.Code Ann. § 16-13-1203 (Repl.1994) which provided the voters of the district must elect the judges who preside over all cases arising within the district. Similarly, § 16-10-101 (authorizing assignment by Chief Justice) merely implements the mandate of art. 7, § 22 and does not, per se, conflict with Ark.Code Ann. §§ 16-13-210 or 16-13-903.

The majority concludes that because Judge Lineberger's assignment was valid and gave him jurisdiction, Judge Neal's "attempt to assume jurisdiction" was clearly erroneous and void. Judge Neal, however, was a duly elected circuit judge for Phillips County, and he had not disqualified from serving on the case. Therefore, there was no basis for assigning another judge to hear a matter which he was capable of presiding over, and, in fact, elected to preside over. In essence, it could be concluded that Judge Neal had already exercised jurisdiction over the matter.

In the instant case, the critical question is whether a judge may be assigned under § 16-10-101 even though there is a regular circuit judge who has not recused and is capable of hearing the matter. This court clearly has the authority to assign judges under § 16-10-101, and the provision does not appear to place limitations upon that power. However, we have limited that authority by stating that if a trial court has problems with congested dockets or conflicts in scheduling, and the prompt and proper administration of justice warrant it, the temporary assignment of judges may be had pursuant to § 16-10-101. Arkansas Dep't of Human Services v. Templeton, 298 Ark. 390, 769 S.W.2d 404 (1989). Thus, it would appear that the trial court must have problems with

congested dockets or conflicts in scheduling before the court may simply assign a judge.

Surely we are not granted unlimited authority to assign a circuit judge. In the instant case, the assignment was probably inadvertent, but the impact is the same. If the assignment of Judge Lineberger is deemed valid, then the court would, in essence, be granted the authority to assign and reassign circuit judges without even a request from the regular sitting judges. This court has stated that the prompt and proper administration of justice must warrant the assignment. Because Judge Neal was capable of hearing the matter, the assignment of Judge Lineberger was not warranted.

Because this court did not have the authority to assign Judge Lineberger, he does not have jurisdiction to hear the matter, or any matter in Phillips County. See Waddle v. Sargent, 313 Ark. 539, 855 S.W.2d 919 (1993). The general rule is that a judgment entered without jurisdiction of the person or the subject matter or in excess of the court's power is void. West v. Belin, 314 Ark. 40, 858 S.W.2d 97 (1993). Further, in Abercrombie v. Green, 235 Ark. 776, 362 S.W.2d 12 (1962), this court recognized that the constitution and statutes require that a special circuit judge or chancellor be elected by the attorneys in attendance in the court and that the [*184] proceedings be entered upon the record. This court stated that where the parties attempt to select a special judge by agreement the proceedings are void. Id. Thus, any proceedings by Judge Lineberger would be void.

I conclude, without reservation, that this court and the AOC should, in every instance, be charged with the responsibility for knowing the status of the duly elected, sitting judges in a district before making any assignment pursuant to § 16-10-101, and it matters not whether the assignment of Judge Lineberger in this case was made inadvertently, by oversight, or with knowledge of the status of Judge Neal; it was made in error and the result is the same--the assignment is void.

Additionally, there is not one document among the voluminous documentation included with the petition, nor is there even an allegation, indicating that the respondent or Judge Olly Neal were ever aware of the assignment of Judge Lineberger, until the order appointing him was filed with the Circuit Clerk of Phillips County on September 14, 1994. The majority goes so far as to even state that the respondent should have been aware of this assignment pursuant to the "duty of a litigant to keep himself informed of the progress of his case." The majority is in essence characterizing the assignment of a circuit judge as somehow part and parcel of the underlying adversarial proceeding; I take issue with this characterization. Further, the issues of Judge Neal's alleged conflict of interest and his refusal to disqualify are not presently before us and are irrelevant; the injection of these issues into the jurisdictional question presented by petitioner serves only to cloud the real issue before us, that of the validity of the assignment of Judge Lineberger in the first place.

Finally, the proper remedy to resolve this conflict is a direct appeal. The settled rule is that when there is a remedy by appeal, a writ of certiorari will not be granted unless there was a want of jurisdiction, or an excess in its jurisdiction, by the court below. Arkansas Dep't of Human Servs. v. Templeton, 298 Ark. 390, 769 S.W.2d 404 (1989). The want of jurisdiction or act in excess of jurisdiction must be apparent on the face of the record. Id. In the instant case, Judge Neal is a regular circuit judge for Phillips County and he heard a matter pending in Phillips County Circuit Court. Thus, it is not apparent on the face of the record that there was a want of jurisdiction or an act in excess of jurisdiction. In Wessell, supra, this court addressed on direct appeal the question of which judge had the authority to act--an assigned judge or a judge elected by attorneys pursuant to art. 7, § 21.

Today's holding stands for the proposition that this court, through the office of the Chief Justice, can make an assignment of a judge foreign to a district upon the most casual and offhanded of requests, or even in the absence of any request at all, without regard to the status of the duly elected judges serving in the county

and district, and such assignment will be a valid exercise of the statutory authority under § 16-10-101, so long as the sitting judge has not actually commenced proceedings on the case. Certainly this court does not contemplate wielding its considerable power in this fashion in the future, and just as certainly it should not do so in this instance. The citizens of the First Judicial District have elected Judge Neal as the circuit judge to hear cases brought forward in Phillips County. To deny his constitutional authority over any proceeding in this unprecedented manner is to impermissibly deprive these citizens of their voice in the election of the judicial officer for their district.

I respectfully dissent.

(FN1.) Judge Olly Neal was elected at the General Election on November 3, 1992.

(FN2.) Section 16-10-101 provides in pertinent part as follows:

> (a) The Arkansas Supreme Court shall have general superintending control over the administration of justice in all courts in the State of Arkansas. The Chief Justice of the Supreme Court shall be directly responsible for the efficient operation of the judicial branch and of its constituent courts and for the expeditious dispatch of litigation therein and the proper conduct of the business of the courts.
>
> (b)(1) Under rules prescribed by the Supreme Court, the Chief Justice may require reports from all courts of the state and may issue such orders and regulations as may be necessary for the efficient operation of those courts to ensure the prompt and proper administration of justice and may assign, reassign, and modify assignments of judges of the circuit court, the chancery court, and the probate court to hold, upon a temporary basis, regular or special sessions

for the transaction of civil or criminal business within any other such court.

(FN3.) The dissent suggests this court's assignment of Judge Lineberger exceeded its powerof temporary appointments under Act 496. Such is not the case. Again, when this court temporarily assigned Judge Lineberger to hear this case, the record showed that such assignment was necessary for the proper administration of justice.

(FN4.) Petitioner suggested Judge Neal's disqualification, citing the Judge's past association with respondent in the practice of law.

APPENDIX 6

WILSON V. NEAL
939 S.W.2d 312, 327 Ark. 783 (Ark. 1997)

Supreme Court of Arkansas.
Jimmie L. WILSON, Appellant,
v.
James A. NEAL, Appellee.
No. 96-1524.
March 24, 1997.

OPINION

PER CURIAM.

Movant Jimmie L. Wilson has filed two motions for an extension of time to file his appellant's brief because of his current service in the Arkansas General Assembly. Wilson also states in his motion dated February 27, 1997, that the supplemental record ordered by this court has not been filed. In returning the writ of certiorari, the Phillips County Circuit Clerk advised this court that no hearing had been scheduled or held in circuit court to settle the record and, thus, no order of the circuit court, giving her directions, had been forthcoming.

Wilson is correct that his legislative service entitles him, as a party to this matter, to a stay of proceedings. The pertinent statute provides a stay for 30 days after adjournment of the legislative session, sine die. Ark.Code Ann. § 16-63-406 (1987). Wilson asks for an extension of time of 45 days in which to file his brief after the legislature adjourns. The request is granted. Counsel for the parties are encouraged to proceed with a hearing to settle the record in this case forthwith. The settled record in this matter shall be filed as soon as is practicable, and Wilson shall file his appellant's brief within 45 days after the General Assembly adjourns.

NEWBERN, GLAZE and CORBIN, JJ., not participating.

APPENDIX 7

WILSON V. NEAL
947 S.W.2d 338, 329 Ark. 125 (Ark. 1997)

Supreme Court of Arkansas.
Jimmie L. WILSON, Appellant/Petitioner,
v.
James A. NEAL, Appellee,
John Plegge, Respondent No. I,
Wanda W. McIntosh, Respondent No. II.
No. 96-1524.
June 16, 1997.

OPINION

LEAD
PER CURIAM.

This petition for writ of mandamus is the outgrowth of our direction to the trial court to settle the record in this appeal. Petitioner Jimmie L. Wilson moves the court for the writ to direct the trial court to include the record in a U.S. District Court cause, Wilson v. Neal, 920 F.Supp. 976, as part of the record in this appeal. Petitioner Wilson claims that without the federal record his record on appeal is inadequate. Petitioner Wilson further challenges the failure of the trial court to include in the record the proceedings before Hon. Lance Hanshaw, Special Circuit Judge; Hon. John Lineberger, Special Circuit Judge; and Hon. Olly Neal, former Circuit Judge.

Respondent Neal answers that he has no objection to supplementing the record in this matter with the Hon. Lance Hanshaw trial (Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994)), which is on file with the Arkansas Supreme Court. Respondent Neal also tenders the transcript of proceedings before the Hon. Olly Neal on May 17, 1995, as a potential supplement to the record in the appeal at hand. He further observes that there is

no record of proceedings before Hon. John Lineberger. Respondent Neal adds that Petitioner Wilson made no request for an extension of time for the preparation of the transcripts for these three proceedings and, indeed, had stated in the notice of appeal for each proceeding that a transcript was being prepared.

The petition for writ of mandamus is denied. This extraordinary writ does not lie for matters that involve the discretion of the trial court. Saunders v. Neuse, 320 Ark. 547, 898 S.W.2d 43 (1995). Here, it is clear that the trial court determined that the federal district court record was not relevant to its decision concerning settlement of the record because it was extraneous to the proceeding before it and to its decision. The trial court did note that supplementing the record with other proceedings was a matter to be decided by the appellate court. We agree.

Writ denied.

NEWBERN, GLAZE and CORBIN, JJ., not participating.

APPENDIX 8

WILSON V. NEAL
964 S.W.2d 199, 332 Ark. 148 (Ark. 1998)

Supreme Court of Arkansas.
Jimmie L. WILSON, Appellant,
v.
James A. NEAL, Appellee.
No. 96-1524.
March 5, 1998.

COUNSEL

George E. Hairston, New York, NY, E. Dion Wilson, Victor Hill, Helena, Roy C. Lewellen, Sam Whitfield, Marianna, for Appellant.

Robert J. Donovan, Marianna, for Appellee.

OPINION

LEAD
IMBER, Justice.

Attorney Jimmie L. Wilson appeals the trial court's order of summary judgment which disbarred him from the practice of law in Arkansas. We reverse and remand for a hearing to determine the appropriate sanction for Wilson's violation of Model Rule of Professional Conduct 8.4(b).

In the words of Chief Judge Waters of the United States District Court, the procedural background of this case is "long and tortured," Neal v. Wilson, 920 F.Supp. 976 (E.D. Ark.1996), and it has been discussed in detail in three other opinions. See Neal v. Wilson, 112 F.3d 351 (8th Cir.1997); Neal v. Wilson, 321 Ark. 70, 900 S.W.2d 177 (1995); Neal v. Wilson, 316 Ark. 588, 873 [**153] S.W.2d 552 (1994). The facts relevant to the issues presented in this appeal are as follows.

In 1981 and 1982, Jimmie L. Wilson borrowed approximately $775,230 from the Farmers Home Administration (FmHA) for farm operating expenses. The loan was secured by an FmHA lien on Wilson's crops. On August 22, 1990, Wilson pled guilty in the United Stated District Court, Eastern District, to three counts of violating 18 U.S.C. § 658 (FN1) by "knowingly" disposing of soybeans and rice that were mortgaged and pledged to the FmHA, and two counts of violating 18 U.S.C. § 641 (FN2) by "knowingly" taking money from a Department of Agriculture bank account and using it for unapproved purposes. For these crimes, Wilson was sentenced to four and one-half months in prison and three years of probation. The United States District Court also suspended Wilson's license to practice law in the federal courts until final disposition of the disciplinary actions taken against him.

On March 29, 1991, the Arkansas Committee on Professional Conduct ("Committee") notified Wilson that a complaint had been filed against him alleging that his misdemeanor convictions in the federal court constituted a violation of the Model Rules of Professional Conduct. Wilson failed to respond either personally or in writing to the merits of the allegations contained in the complaint. On July 22, 1991, the Committee determined by a unanimous vote that Wilson had violated the Model Rules, and on October 9, 1991, the Committee filed a disbarment action against Wilson in the Phillips County Circuit Court.

Over the next five years, numerous pleadings and interlocutory appeals were filed in this case. See Neal v. Wilson, 112 F.3d 351 (8th Cir.1997); Neal v. Wilson, 920 F.Supp. 976 (E.D.Ark.1996); Neal v. Wilson, 321 Ark. 70, 900 S.W.2d 177 (1995); Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994). Finally, on August 30, 1996, the Phillips County Circuit Court entered summary judgment in favor of the Committee. In its order, the court: 1) rejected Wilson's argument that the Committee had denied him due process of law by denying his requests for extensions to respond to the initial complaint; 2) denied Wilson's request for additional discovery; 3) found that Wilson had violated

Model Rule 8.4; and 4) held that disbarment was the appropriate sanction. From this order, Wilson filed a timely notice of appeal.

On appeal, Wilson contends that there were numerous errors and violations of his constitutional rights throughout the disbarment process before the Committee and the trial court. We will address these issues in the order in which they arose.

I. Double Jeopardy and Collateral Estoppel

As previously mentioned, this is the third state appeal in this matter. For his first argument on appeal, Wilson contends that the doctrines of collateral estoppel and double jeopardy should have prevented the Committee from continuing the disbarment action against him. Wilson is procedurally barred from raising these arguments on appeal because they were not raised below or ruled upon by the trial court. Wilson v. Rebsamen Ins. Inc., 330 Ark. 687, 957 S.W.2d 678 (1997); McGhee v. State, 330 Ark. 38, 954 S.W.2d 206 (1997). It is well settled that to preserve arguments for appeal, even constitutional ones, the appellant must obtain a ruling below. Akins v. State, 330 Ark. 228, 955 S.W.2d 483 (1997). Accordingly, we reject this argument without reaching the merits.

II. Requests for Extensions

Next, Wilson contends that the Committee violated his right to procedural due process when it denied his requests for an extension to prepare a response to the initial complaint filed before the Committee. Citing McCullough v. Neal, 314 Ark. 372, 862 S.W.2d 279 (1993), the Committee contends that this issue is procedurally barred because Wilson failed to exhaust his administrative remedies. According to Sections 5(E)(3) and (F)(1) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, an attorney who has been cautioned, reprimanded, or suspended has a right to a de novo hearing before the Committee. In McCullough, we held that an attorney who failed to exercise this administrative remedy was procedurally barred from contesting the Committee's decision on

direct appeal. Id. This case, however, is distinguishable from McCullough, because if the vote is to initiate disbarment proceedings, Section 5(E)(5) declares that the Committee shall file a disbarment action in circuit court and "there shall be no hearing before the committee." Because Wilson did not have any further administrative remedies [*203] before the Committee, as did the attorney in McCullough, we conclude that the issue is not procedurally barred.

Turning to the merits, we have previously explained that the power to regulate and define the practice of law is a prerogative of the judicial department as one of the divisions of government. Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994); Weems v. Supreme Court Comm. on Professional Conduct, 257 Ark. 673, 523 S.W.2d 900 (1975). Moreover, Amendment 28 to the Arkansas Constitution declares that, "[t]he Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." Accordingly, we have promulgated the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys of Law, which state in relevant part that:

(1) Upon receiving information of such complaint, the attorney shall have twenty (20) days in which to file a written response consisting of an original and eight (8) copies with the Executive Director....

(2) The Executive Director is authorized to grant, at the request of an attorney, an extension of reasonable length for the filing of a response. Subsequent requests for extensions must be in written form and will be ruled on by the Chairman of the Committee.

Section 5(C).

[3] On March 29, 1991, the Committee sent Wilson a letter announcing that a complaint had been filed against him. According to Section 5(C)(1), Wilson had twenty days to respond to the complaint. Instead of filing a response, Wilson's attorney

sent a letter to the Committee on April 15, 1991, asking for an extension until August 30, 1991. The Executive Director of the Committee granted Wilson an extension until May 20, 1991. On appeal, Wilson argues that the Committee violated his rights because it granted him an extension for only one month instead of for the three and one-half months that he requested. According to Section 5(C)(2), the Executive Director has the authority to grant the first extension for a "reasonable length" of time. We hold that one month was a reasonable length of time because Wilson already had twenty days to respond, and he was represented by competent counsel who could have helped him prepare his response.

On May 20, 1991, Wilson tendered a second request for an extension which was denied by the Committee Chairman. At this point, the Committee had already given Wilson one extension, thereby allowing him almost two months instead of the usual twenty days to file his response. Accordingly, we also hold that the Committee did not violate Wilson's rights when it denied his second request for an extension.

III. Constitutionality of the Procedures Regulating Professional Conduct

After denying Wilson's two requests for extensions, the Committee determined by a unanimous vote that Wilson's misdemeanor convictions in the federal court constituted a violation of the Model Rules. The Committee then filed a disbarment action against Wilson in the Phillips County Circuit Court pursuant to Section 6(B), which states in relevant part that:

When a complaint against an attorney is based on a conviction of a felony or a crime which also violates Rule 8.4(b) of the Model Rules of Professional Conduct, the Committee shall institute an action of disbarment.

(Emphasis added.)

On appeal, Wilson argues that this rule is unconstitutional because it grants the Committee unfettered discretion to determine

what crimes constitute a violation of Model Rule 8.4(b), and to arbitrarily choose when they will pursue disbarment. We find no merit to either of these arguments because the rule unambiguously proclaims that the Committee "shall" institute a disbarment action when it determines that a crime constitutes a violation of Model Rule 8.4(b). The Committee simply has no discretion on whether or not to file a disbarment action. Moreover, it is the trial court, not the Committee, that ultimately determines whether there has been a violation of the Model Rules, and whether disbarment is the appropriate sanction. Section 5(G)(2). Accordingly,[*204] we also find no merit to Wilson's third point on appeal.

IV. Discovery

After the disbarment action was filed, Wilson propounded interrogatories to the Committee which included a detailed request for information regarding any complaint the Committee had ever received against an attorney who had been convicted of a criminal offense. Wilson contended that he needed this information to develop his disparate-treatment argument. When the information was not forthcoming, Wilson filed a motion to compel, which was denied by the trial court. Wilson claims that the trial court committed reversible error when it rendered this ruling. We disagree.

It is well settled that a trial court has wide discretion in matters pertaining to discovery, and thus we will reverse a trial court's ruling only when there has been an abuse of discretion. Parker v. Southern Farm Bureau Cas. Ins. Co., 326 Ark. 1073, 935 S.W.2d 556 (1996); Stein v. Lukas, 308 Ark. 74, 823 S.W.2d 832 (1992). Moreover, a discovery motion must be considered in light of the particular circumstances which give rise to the request and the need of the movant for the information requested. Parker, supra; Marrow v. State Farm Ins. Co., 264 Ark. 227, 570 S.W.2d 607 (1978).

We hold that the trial court did not abuse its discretion when it denied Wilson's motion to compel for several reasons. First, the majority of the information that Wilson requested was a

matter of public record which he could have easily obtained from the Arkansas Supreme Court Clerk pursuant to Section 4(C), which declares that:

> When a letter of caution, reprimand, or suspension becomes final under these Procedures, or when the Committee decides to initiate disbarment proceedings, a copy of such shall be forwarded to the Clerk and shall be maintained as a public record by the Clerk.

Second, during the hearing on Wilson's motion to compel, the Executive Director of the Committee voluntarily took the stand and answered many of Wilson's questions about other attorneys who had been convicted of criminal offenses. The Committee also presented its files, which were reviewed in camera by the trial court. After reviewing the materials, the court determined that the Committee had adequately complied with Wilson's request.

Finally, the court found that Wilson had been given ample opportunity over the five years that this case was pending to engage in meaningful discovery, but that he had been "less than diligent." Based on these circumstances, we cannot say that the trial court abused its discretion when it denied Wilson's motion to compel. Accordingly, we also affirm on this point.

V. Violation of Model Rule 8.4(b)

The first issue the trial court had to resolve in the disbarment action was whether Wilson's misdemeanor convictions constituted a violation of Model Rule 8.4(b). Model Rule 8.4(b) provides that it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." In his defense, Wilson argued that his misdemeanor convictions did not constitute a violation of this rule because he did not commit the crimes with a culpable mens rea. We hold that the trial court properly rejected this argument for two reasons.

First, both crimes to which Wilson pled guilty required knowing conduct. See 18 U.S.C. §§ 641 and 658. Wilson pled

guilty to three charges that he knowingly disposed or converted to his own use crops pledged to the FmHA, and to two charges that he knowingly took money from a controlled Department of Agriculture bank account and used the money for unapproved purposes. Second, Section 6(B) declares that a certified copy of the judgment of conviction "shall be conclusive evidence of the attorney's guilt" of the underlying crime, and that the attorney may not "offer evidence inconsistent with the essential elements of the crime for which he was convicted." Thus, once Wilson was convicted in federal court, he was precluded from relitigating the elements[*205] of the crimes during the disbarment proceeding.

After considering the arguments by both sides, the trial court entered summary judgment in favor of the Committee. As we have said on numerous occasions, a trial court may grant summary judgment pursuant to Ark. R. Civ. P. 56 if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Wilson v. Rebsamen Ins. Inc., 330 Ark. 687, 957 S.W.2d 678 (1997); Sanders v. Bradley County Human Serv. Pub. Facilities Board, 330 Ark. 675, 956 S.W.2d 187 (1997). In making this determination, we review the evidence in the light most favorable to Wilson, as the party resisting the motion, and resolve all doubts and inferences in his favor. Wilson, supra; Sanders, supra. In this case, the trial court concluded that the "law of the case" and the "undisputed facts" required a determination that Wilson's misdemeanor convictions constituted a violation of Model Rule 8.4(b). These rulings will be considered separately.

We hold that the trial court erred when it concluded that the law-of-the-case doctrine prevented it from deciding whether Wilson violated Model Rule 8.4(b). The law-of-the-case doctrine precludes a trial court from reconsidering questions that were "explicitly or implicitly" determined on appeal. Foreman v. State, 328 Ark. 583, 945 S.W.2d 926 (1997). In Neal v. Wilson, 316 Ark. 588, 873 S.W.2d 552 (1994), Wilson's first appeal in this case, one of the issues on appeal was whether the [**160] Model Rules were applicable because they were adopted after Wilson committed the federal crimes, but before he was convicted. We

held that the Model Rules applied because the relevant date was the day Wilson was convicted and not the days on which the crimes were committed. Id. In making this determination we said:

> Rule 8.4(b), which defines "professional misconduct" in part as the commission of "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects," and which comprehends the misdemeanor charges to which Mr. Wilson pled guilty, was effective as part of the Model Rules of Professional Conduct on January 1, 1986, having been adopted by per curiam order on December 16, 1985.

Id. With this language, we were merely clarifying our holding that the Model Rules applied to Wilson's federal convictions. We were not, however, either "explicitly or implicitly" making a factual conclusion that Wilson's conduct constituted a violation of Model Rule 8.4. In fact, later in the opinion we specifically denied the Committee's request to pronounce judgment on this issue because the trial court had not ruled on the matter. Id. Accordingly, we conclude that the trial court erred when it found that the law of the case mandated summary judgment in favor of the Committee.

This, however, does not end our inquiry because the trial court also found that "the undisputed facts" established that Wilson's federal convictions constituted a violation of Model Rule 8.4(b). We agree. According to Model Rule 8.4(b), it is professional misconduct for a lawyer to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." The Comments to Rule 8.4 further explain that:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return.... Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving

[**161] violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category.

(Emphasis added.)

In this case, Wilson was convicted of five counts of "knowingly" converting money and property that belonged to the federal government in violation of 18 U.S.C. §§ 641 and 658. Although all five crimes were misdemeanors, we agree with the trial court that these convictions involved dishonesty and a breach of trust, and seriously undermined "the confidence of the public in our legal profession." See In re Lee, 305 Ark. 196, 806 S.W.2d 382 (1991). Because we have no hesitation in holding that Wilson's convictions reflected adversely on Wilson's fitness to practice law, we affirm the trial court's finding that Wilson violated Model Rule 8.4(b).

VI. Right to A Full Trial

Next, Wilson argues that by entering summary judgment on this issue, the trial court denied him a right to an "action" and a "trial" under Section 5(G)(1), which states that:

An action for disbarment shall be filed with the Clerk of the Circuit Court of the county in which the attorney resides, or in which the alleged violation was committed. In disbarment suits, the action shall proceed as an action between the Executive Director and the respondent. Proceedings in the Circuit Court shall be held in compliance with the Arkansas Rules of Civil Procedure and trial shall be had before the Circuit Judge without a jury.

Wilson somehow construes this section to give him an absolute right to a full trial and thus precludes the entry of summary judgment. We disagree. According to Section 5(G)(1), the Rules of Civil Procedure, including Ark. R. Civ. P. 56 on summary judgments, apply once the Committee files a disbarment action in the circuit court. Because summary judgment was appropriate in this case for the reasons explained above, we hold that the trial court was not required to hold a full trial.

VII. Appropriate Sanction

Once the trial court concluded that Wilson's federal convictions constituted a violation of Model Rule 8.4(b), the next step was to determine the appropriate sanction. It is in this final stage of the disbarment proceeding that we find reversible error.

In its order of summary judgment, the trial court incorrectly found that Wilson "must be disbarred as a matter of law" according to Section 6(B), which provides that:

When a complaint against an attorney is based on a conviction of a felony or a crime which also violates Rule 8.4 b) of the Model Rules of Professional Conduct, the Committee shall institute an action of disbarment.

(Emphasis added.) We disagree with the trial court's reasoning because this section declares what type of action the Committee must file and does not limit the sanctions the court may impose. Instead, we hold that the correct provision is Section 5(G)(2), which provides in relevant part that:

If the Circuit Judge finds that the attorney has violated the Model Rules, he shall caution, reprimand, suspend, or disbar such attorney as the evidence may warrant.

(Emphasis added). It is clear from this provision that the trial court was not required to disbar Wilson, but was entitled to select any one of the four listed sanctions. Accordingly, we hold that the trial court erred when it concluded that disbarment was required as a matter of law.

Again, this does not end our analysis because the trial court also declared in its order of summary judgment that "even if this conclusion were not reached as a matter of law, this Court's conclusion would be the same, based upon the undisputed facts." We cannot agree because the trial court reached this conclusion without all the information necessary to make a decision on the appropriate sanction.

During the hearing on the Committee's motion for summary judgment, the trial court assured Wilson that if it concluded that he had violated Rule 8.4, it would hold a second hearing to determine the appropriate sanction. The trial court, however, never held the second hearing as promised, and instead ordered disbarment before Wilson was ever provided an opportunity to present evidence in mitigation. Clearly, at this point in the disbarment proceeding, Wilson should not have been allowed to relitigate the elements of the underlying crimes, or whether his convictions constituted a violation of Model Rule 8.4(b). Both parties, however, should have been able to present some evidence and arguments as to which of the four sanctions was appropriate in this case.

The American Bar Association Joint Committee on Professional Standards has developed[*207] the following list of aggravating and mitigating factors that we think are useful in a court's determination of an appropriate sanction:

Aggravating Factors:
(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with [the] rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge [the] wrongful nature of [the] conduct;
(h) vulnerability of [the] victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution;
(k) illegal conduct, including that involving the use of controlled substances.

Mitigating Factors:
(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify [the] consequences of [the] misconduct;

(e) full and free disclosure to [the] disciplinary board or cooperative attitude towards [the] proceedings;

(f) inexperience in the practice of law;

(g) character or reputation;

(h) physical disability;

(i) mental disability or chemical dependency including alcoholism or drug abuse when;

(1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;

(2) the chemical dependency or mental disability caused the misconduct;

(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

j) delay in [the] disciplinary proceedings;

k) impositions of other penalties or sanctions;

l) remorse;

m) remoteness of prior offenses.

Model Standards for Imposing Lawyer Sanctions §§ 9.22 and 9.32 (1992).

For these reasons, we affirm the trial court on the first six issues and reverse only on the final issue of sanctions. We remand for a sanction hearing during which each side may present evidence and arguments regarding the above-listed aggravating and mitigating factors. The parties, however, must limit their arguments to these matters, and for the reasons explained above, are precluded from relitigating the elements of underlying federal crimes, or whether those convictions constituted a violation of the Model Rules.

Affirmed in part and reversed and remanded in part for proceedings consistent with this opinion.

GENE E. McKISSIC, CHARLES D. BARNETTE and JACK T. LASSITER, Special Justices, join in this opinion.

NEWBERN, GLAZE and CORBIN, JJ., not participating.

(FN1.) This statute says in relevant part that:

> Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts to his own use or to that of another, any property mortgaged or pledged to, or held by, ... the Secretary of Agriculture acting through the Farmers Home Administration ... shall be fined under this title or imprisoned ... or both....

(FN2.) This statute says in relevant part that:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or any department or agency thereof, ... shall be fined under this title or imprisoned ... or both....

APPENDIX 9

PROCEDURES OF THE COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW

SECTION.	SECTION.
1. Scope	5. Procedure
2. Committee	6. Criminal Activity.
3. Executive director	7. Sanctions.
4. Confidentiality/Records.	8. [Deleted].

SECTION 1.

SCOPE

A. PURPOSE. These Procedures are promulgated for the purposes of regulating the professional conduct of attorneys at law and shall apply to all complaints within the purview of the Model Rules of Professional Conduct or any former rules adopted by the Arkansas Supreme Court filed against attorneys after the effective date of these Procedures. Every attorney now or hereafter licensed to practice law in the State of Arkansas shall be a member of the Bar of this State and subject to these Procedures. The jurisdiction of the Supreme Court Committee on Professional Conduct shall extend to lawyers in inactive or suspended status.

* * *

SECTION 5.

PROCEDURE

A. GENERAL. The Committee shall investigate and adjudicate all complaints alleging violation of the Model Rules that may be brought to its attention in the form of an affidavit, or in respect of which any member of the Committee may have information, and shall give the attorney involved an opportunity to explain or refute

the charge. The Committee shall accept and treat as a formal complaint any writing signed by a judge of a court of record in this State regardless of whether such signature is verified.

* * *

G. ACTIONS FOR DISBARMENT. (1) An action for disbarment shall be filed with the Clerk of the Circuit Court of the county in which the attorney resides, or in which the alleged violation was committed. In disbarment suits, the action shall proceed as an action between the Executive Director and the respondent. Proceedings in the Circuit Court shall be held in compliance with the Arkansas Rules of Civil Procedure and trial shall be had before the Circuit Judge without a jury.

(2) If the Circuit Judge finds that the attorney has violated the Model Rules, he shall caution, reprimand, suspend or disbar such attorney as the evidence may warrant. If the Judge finds that the complaint of the Committee is not sustained by the evidence, the proceedings shall be dismissed.

* * *

SECTION 7.

SANCTIONS

A. SANCTIONS AUTHORIZED. When the Committee finds that an attorney has violated any provisions of the Model Rules, the Committee is authorized:

(1) To warn (which shall be confidential); or

(2) To issue letters of caution or reprimand; or

(3) To suspend the attorney for a period up to but not exceeding one (1) year; or

(4) To cause a complaint to be prepared and filed with the Circuit Court of proper venue in accordance with the manner provided for disbarment actions in subsequent G of Section 5 of these Procedures; or

(5) To refer matters to the Committee on Unauthorized Practice, the Client Security Fund Committee, the Committee on Judicial Conduct and corresponding lawyer disciplinary authority in other jurisdictions; or

(6) To take other action as authorized by these Procedures.

* * *